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# **Local Ownership of Post-Conflict Reconstruction in International Law: The Initiation of International Involvement**

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## **Abstract:**

This article seeks to help develop a clearer understanding of the impact of international law on local ownership of post-conflict reconstruction. The particular focus of the article is on popular influence over the decision to initiate international involvement that will at least enable, if not direct, the change and development of state and civil infrastructure. The international legal framework and practice under it are analysed from the perspective of two concurrent, but not entirely co-extensive, rationales for local ownership: a stable situation and self-determination of the people. Attention is given to a number of examples from the last twenty years, specifically, Cambodia, Haiti, Bosnia and Herzegovina, Sierra Leone, Solomon Islands, Kosovo, East Timor, Afghanistan, Liberia, Iraq, and Somalia. A central argument is that the underdeveloped nature of the international legal framework for local ownership is important for the stability of post-conflict situations. In particular, the law of self-determination is argued to be useful because it affords international actors a high level of discretion to determine when a request for their involvement is a sufficient reflection of the will of the people. However, it is also contended that the sustainability of this legal framework rests on international actors exercising their discretion responsibly. This entails refusing to initiate involvement on the basis of a request from a government with little claim to be an embodiment of the will of the people, unless there is strong contextual justification for such a course of action.

Key words: local ownership, post-conflict, reconstruction, self-determination, will of the people, consent

## **1. Introduction**

Over the last twenty years, assistance from states and international organisations has been central to the reconstruction of state and civil infrastructure in a number of post-conflict situations. This assistance has been in the form of varying levels of military, financial, administrative and technical support. Examples of situations that are often discussed in the policy and legal literature on post-conflict reconstruction include, Cambodia, Haiti, Bosnia

and Herzegovina, Sierra Leone, Kosovo, East Timor, Afghanistan, Liberia, and Iraq.<sup>1</sup> In each of these examples, political flux combined with extensive international engagement has made it more difficult for the will of the people to be reflected in the decision making on reconstruction, than in a functioning state situation.

This article is concerned with local ownership of post-conflict reconstruction.<sup>2</sup> The particular focus of the article is on two concurrent, but not entirely co-extensive, rationales for a pro-active approach to local ownership. The first is to enhance the stability of the situation. If the people that are affected by a reconstruction process have a sense of ownership over crucial decisions, this will foster goodwill, rather than resistance, towards the outcomes.<sup>3</sup> The second is to reduce inconsistency with the aspect of the political principle of self-determination that posits that the people of a state as a whole should be free, within the boundaries of the state, to determine, without outside interference, their social, political, economic, and cultural infrastructure.<sup>4</sup> This principle of self-determination remains central to international order, but it is contravened by the practice of post-conflict reconstruction that is dependent on international actors.<sup>5</sup> From this perspective, local ownership initiatives operate to improve the connection between the reconstruction process and the will of the people, and thereby help to generate wider international acceptance and support for the practice.

There is a clear overlap between these two rationales for local ownership of internationally facilitated post-conflict reconstruction. However, to improve consistency with the notion of self-determination, there is no inherent reason why efforts at local ownership should take the context into account. In contrast, if efforts at local ownership are not sensitive to contextual factors, such as the strength of a tentative peace, it is likely that they will reduce, rather than enhance, the stability of the post-conflict situation.<sup>6</sup> It is important to highlight this difference

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<sup>1</sup> See, e.g., R Paris and TD Sisk (eds), *The Dilemmas of Statebuilding: Confronting the Contradictions of Postwar Peace Operations* (Routledge, Oxford 2009); B. Bowden, H. Charlesworth, and J. Farrall (eds), *The Role of International Law in Rebuilding Societies after Conflict: Great Expectations* (CUP, Cambridge 2009); J. Stromseth, D. Wippman, and R. Brooks, *Can Might Make Rights? Building the Rule of Law After Military Interventions* (CUP, Cambridge 2006).

<sup>2</sup> Local ownership in the sense of popular participation and representation in decision making on the change and development of state and civil infrastructure or closely related matters, such as the initiation of international involvement. For a narrower approach to the definition of local ownership, one that limits it to the distinction between whether it is international actors or domestic actors that ultimately make the decisions, see E De Brandabere, *Post-Conflict Administrations in International Law: International Territorial Administration, Transitional Authority and Foreign Occupation in Theory and Practice* (Martinus Nijhoff, Leiden, 2009) 277; for an approach to definition of local ownership that is more in line with the broad approach of this article, see B. Pouligny, 'Local Ownership', in V. Chetail (ed.), *Post-Conflict Peacebuilding: A Lexicon*, (OUP, Oxford, 2009) 174 – 187 at 174.

<sup>3</sup> See A. S. Hansen, 'From Intervention to Local Ownership: Rebuilding a Just and Sustainable Rule of Law after Conflict', in C. Stahn and J. K. Kleffner (eds.) *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace* (T.M.C Asser Press, The Hague, 2008) 131 – 152 at 135.

<sup>4</sup> J Waldron, 'Two Conceptions of Self-Determination', in S Besson and J Tasioulas (eds) *The Philosophy of International Law* (OUP, Oxford 2010) 397 -413 at 406.

<sup>5</sup> See RD Caplan, 'Transitional Administration', in Chetail (n 2) 359 - 367 at 364.

<sup>6</sup> See e.g., T Donais, 'Inclusion or Exclusion? Local Ownership and Security Sector Reform', (2009) 3(1) *Studies in Social Justice Volume* 117-131 at 122; J Narten, 'Dilemmas of Promoting Local Ownership: The Case of Postwar Kosovo', in Paris and Sisk (eds) (n 1) pp. 252-83; S Chesterman, 'Ownership in Theory and Practice: Transfer of Authority in UN Statebuilding Operations', (2007) 1 *Journal of Intervention and*

because the international legal framework for local ownership has only been informed by considerations of self-determination. Moreover, the legal right of all peoples to self-determination and the associated right to political participation were formed well before the trend, following the end of the cold war, for large-scale intervention in post-conflict situations. Accordingly, there is good reason to be concerned that the law will have affected the ability of lead actors to tailor local ownership to suit the circumstances of a particular situation. At the same time, though, the law of self-determination remains underdeveloped and much debated in international law. This means that it should also not be assumed that the law ensures a meaningful connection between the reconstruction process and the will of the people.

The difficulties that have been encountered by lead actors when trying to achieve some of the international legal standards related to political participation in post-conflict situations have been highlighted elsewhere.<sup>7</sup> However, to date, little attention has been given to the wider issue about how, if at all, international law contributes to the achievement of the two highlighted rationales which underpin efforts towards greater local ownership.<sup>8</sup> This is an important line of enquiry with regard to the inclusion of the views of the people in the decision making on change and development, but it is also pertinent with regard to the decision to initiate the large-scale international involvement that makes reconstruction possible. As a general matter, the latter aspect of local ownership has been overlooked in both the policy and the legal literature on post-conflict reconstruction. Yet, particularly events in Somalia in 2006/07 suggest that there is a pressing need for some closer consideration of the law directed at local ownership of the initiation of international involvement. In Somalia, Ethiopia's armed forces helped to place the Federal Transitional Government in control of parts of the state, in spite of little evidence that this coincided with the will of the people or signs that the context would be well served.<sup>9</sup>

By examining the role of international law directed at local ownership of post-conflict reconstruction from the perspective of the stability of the post-conflict situation and the self-determination of the people, this article seeks to help develop a clearer understanding of the law's significance. The analysis addresses the law and practice of local ownership of the initiation of international involvement, rather than matters related to the accommodation of

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*Statebuilding* 3–26; O Marenin, 'Understanding Mission Environments: Local Contexts and the Legitimation of Reforms', (2010) 14 *Journal of International Peacekeeping* 223 – 247.

<sup>7</sup> See e.g., M. Salamun, *Democratic Governance in International Territorial Administration* (Baden-Baden: Nomos 2005); L Carlowitz, 'UNMIK Lawmaking between Effective Peace Support and Internal Self-Determination', (2003) 41/3 *Archiv des Völkerrechts* 336; GH Fox, 'International Law and the Entitlement to Democracy after War', (2003) 9 *Global Governance* 2179.

<sup>8</sup> See, though, B Bowden and H Charlesworth 'Defining Democracy in International Institutions', in Bowden, Charlesworth, and Farrall (eds) (n 1) 91, addressing how efforts at defining democracy in international institutions relate to the stability and progress of post-conflict situations; as well as M Cogen and E De Brabandere, 'Democratic Governance and Post-Conflict Reconstruction', (2007) 20 *LJIL* 669 examining the role of international law on political participation in Kosovo, East Timor, Afghanistan, and Iraq; see also T Mikkilineni, 'The Regulation of Political Parties in Post-Conflict Societies,' (2009) *I.I.L.J. Emerging Scholar Paper* <<http://www.iilj.org/publications/documents/MikkilineniESP13-09.pdf>> considering the appropriateness of the international regulatory framework for anti-democratic political parties in post-conflict situations.

<sup>9</sup> See Report of the Secretary General on the Situation in Somalia, UN Doc S/2007/115, 28 February 2007 para. 5.

the views of the population in the subsequent decision making on change and development of the state and civil infrastructure.<sup>10</sup> A central argument is that the underdeveloped nature of the international legal framework for local ownership is important for the stability of post-conflict situations. In particular, the law of self-determination is argued to be useful because it affords international actors a high level of discretion to determine when a request for their involvement is a sufficient reflection of the will of the people. However, it is also contended that the sustainability of this legal framework rests on international actors exercising their discretion responsibly. This entails refusing to initiate involvement on the basis of a request from a government with little claim to be an embodiment of the will of the people, unless there is strong contextual justification for such a course of action.

Before proceeding, it should be noted that this article does not address in any detail the legal issues surrounding, or the role of, a UN Security Council chapter VII authorisation for international involvement in post-conflict reconstruction.<sup>11</sup> It is, though, important to clarify the relationship between a chapter VII resolution and the legal right of all peoples to self-determination. A chapter VII resolution can provide a legal justification for international engagement in post-conflict situations. The passage of such a resolution and its scope relates to the possibility of agreement amongst the members of the Security Council. More specifically, agreement that there is a threat to international peace and security and on the type of response that is necessary to address the threat.<sup>12</sup> There has been extensive debate about the limits of the authority of the Council in international law.<sup>13</sup> It is sufficient to note that the legitimacy, and therefore effectiveness, of Council resolutions is attached to consistency with international law, especially fundamental principles of international law such as the right to self-determination.<sup>14</sup> This means that although the Council may be able to bypass, as a matter of international law, the requirements of the right to self-determination,<sup>15</sup> it is unlikely to be able to agree to do so, apart from perhaps where the threat to international peace and security is of a particularly extreme and pressing nature. Consequently, even where there has been a chapter VII authorisation for international involvement in a post-conflict situation, the right to self-determination can still be expected to have had some impact on the process surrounding the initiation of this involvement.

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<sup>10</sup> It should also be stressed that the article does not consider the potential for conflict between two key principles of the United Nations' agenda for rule of law reconstruction in post-conflict situations: that reconstruction should be in line with international standards but at the same time locally owned, see S Vig, 'The Conflictual Promises of the United Nations' Rule of Law Agenda: Challenges for Post-Conflict Societies', (2009) 13 *Journal of International Peacekeeping* 131–158.

<sup>11</sup> See J. Stromseth, D. Wippman, and R. Brooks (n 1) pp. 30–33; G Fox *Humanitarian Occupation* (CUP, Cambridge 2008) 200 – 217.

<sup>12</sup> See U.N. Charter arts 39, 41, and 42; see also S Wheatley, 'The Security Council, Democratic Legitimacy, and Regime Change in Iraq', (2006) 17 *EJIL* 531 at 543.

<sup>13</sup> See D Akande, 'Are there Limits to the Powers of the Security Council?', (2007) 5 *Journal of International Law and Policy* 2.

<sup>14</sup> ND White, 'The Will and Authority of the Security Council after Iraq', (2004) 17 *LJIL* 645 at 672.

<sup>15</sup> See MC Wood, Hersch Lauterpacht Memorial Lectures 2006: The UN Security Council and International Law, Second Lecture, p. 9, para. 28, available at <[http://www.lcil.cam.ac.uk/lectures/2006\\_sir\\_michael\\_wood.php](http://www.lcil.cam.ac.uk/lectures/2006_sir_michael_wood.php)>; Wheatley n. 12 at 541; M Matheson, 'United Nations Governance of Postconflict Societies', 95 *AJIL* (2001) 76, at 85.

It is first useful to expand on the role of local ownership in the practice of post-conflict reconstruction. The intention here is not to extensively map the debate about the merits of different approaches to local ownership. Rather, the aim is to explain why the present international legal framework for local ownership of post-conflict reconstruction might be expected to struggle in terms of relevance. This discussion underpins the analysis of the international legal framework for local ownership of the initiation of international involvement, and practice under it, in subsequent sections.

## **2. Stable Post-Conflict Situations, Self-Determination, and *Jus Post Bellum***

Any government that purports to be a conclusive embodiment of the will of all the people within a territory must be treated with suspicion. Most fundamentally, this is because the will of the people is an abstract concept, there is no monolithic thought pattern to which all the people adhere. It is also because decisions will inevitably be taken on the basis of political expedience rather than what is wanted by or is rationally in the best interests of the state and its people.<sup>16</sup> Nonetheless, governments that are able to maintain public order without resort to the threat of force must come closer to realising the will of the people than dictators reliant on force. This is because the compliance of the people entails an implication that they want the government to determine the future of the state on their behalf.<sup>17</sup> Moreover, the implication that an effective government has a legitimate claim to be an embodiment of the will of the people is enhanced if the government forms part of a political system in which the population are able – through voting, for instance – to have a bearing on the ability of the government to continue in authority.<sup>18</sup> The post-conflict setting complicates matters.

No standard definition of a post-conflict situation exists. This article proceeds on the basis that, although in most situations there will not be a clear demarcation between conflict and post-conflict,<sup>19</sup> post-conflict is somewhere in-between conflict and peace. And that post-conflict entails circumstances of political flux which will make it difficult to identify a government with a legitimate claim to represent the views of the people. Indeed, efforts at reconstruction are likely to be necessary before a viable political entity with a legitimate claim to be an embodiment of the will of the people can be identified.<sup>20</sup> This has consequences for the extent to which it is ever going to be possible for a reconstruction process in the aftermath of war to reflect the will of the people. In particular, it means it can be difficult to connect a request for international engagement to the will of the people; and

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<sup>16</sup> The Trustees of the Late Duke of Westminster's Estate v UK (1983) 5 EHRR 440 at 546.

<sup>17</sup> See BR Roth, *Governmental Illegitimacy in International Law* (Clarendon Press, Oxford, 1999) at 137-142 and 419; D Wippman, 'Treaty-Based Intervention: Who Can Say No?', (1995) 62 *University of Chicago Law Review* 607 at 612.

<sup>18</sup> See I. Shapiro, *The State of Democratic Theory* (Princeton University Press, Princeton 2003) exploring the view 'that a central task for democracy is to enable people to manage power relations so as to minimise domination' p.3.

<sup>19</sup> G. Verdirame, 'Human Rights Protection by the UN in Post-Conflict Situations: Accountability', in ND White and D Klaasen (eds) *The UN, Human Rights, and Post-Conflict Situations* (Manchester University Press, Manchester 2005) 81 -97 at p. 83

<sup>20</sup> M. Evans, 'Balancing Peace, Justice and Sovereignty in Jus Post Bellum: The Case of "Just Occupation"', (2008) 36 *Journal of International Studies* 542 at 549.

then that it can be difficult for the views of the people to be included in the decision making on reconstruction which the international involvement facilitates.

The distance between decision making and the will of the people is readily apparent where the reconstruction is by direct international governance. This was the case in Kosovo and East Timor.<sup>21</sup> However, extra distance is also present where a domestic government is completely dependent on international actors. This has been the case in places like Haiti, Liberia, Sierra Leone, and Afghanistan.<sup>22</sup> In such circumstances, the fact that a government's authority is dependent on the international assistance might lead it – without the usual incentive to retain the favour of the people – to concentrate on its own political and economic interests rather than those of the people.<sup>23</sup> Alternatively, the government might feel pressure, explicit or implicit, to prioritise the preferences of the international actors that make the reconstruction process possible.<sup>24</sup> Still, international involvement in post-conflict situations can be seen as central to the preservation of public order and the possibility of reconstruction in the post-conflict setting.<sup>25</sup> Accordingly, there is a basis for querying why it is even necessary to attempt to improve local ownership.<sup>26</sup>

### ***A. Two Rationales for Local Ownership***

One technique to achieve greater local ownership is through a pro-active approach to popular participation in politics once the internationally dependent governance arrangement is in place. To date, this has tended to be the focus of the policy debate on best practice proposals.<sup>27</sup> However, no matter how much effort is made to accommodate the views of the people in the internationally facilitated reconstruction, the very fact of dependence on international actors will prevent, for the reasons set out above, the governance conditions of a functioning state being replicated. Such a reality increases the importance of another dimension of local ownership: linking the initiation of international involvement to the will of

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<sup>21</sup> See D. Chandler, *From Kosovo to Kabul: Human Rights and Humanitarian Intervention* (Pluto Press, London 2002) 204; D. Zaum, *The Sovereignty Paradox: The Norms and Politics of International Statebuilding* OUP, Oxford, 2007) at 27 and 136; for a detailed comparison between recent instances of direct international governance of post-conflict territories and the traditional international law concept of trusteeship, see R. Wilde, *International Territorial Administration: How Trusteeship and the Civilising Mission Never Went Away* (OUP, Oxford, 2008).

<sup>22</sup> See M. Saul, 'From Haiti to Somalia: The Assistance Model and the Paradox of State Reconstruction in International Law', (2009) 11 *International Community Law Review* 119 – 148; see also L. Andersen, 'Outsiders Inside the State. Post Conflict Liberia between Trusteeship and Partnership', (2010) 4 *Journal of Intervention and Statebuilding* 129 – 152.

<sup>23</sup> M. Barnett and C. Zürcher, 'The Peacebuilder's Contract: How External Statebuilding Reinforces Weak Statehood', in R. Paris and T. D. Sisk (eds), (n 1) 23 – 52 at pp. 31 – 35.

<sup>24</sup> Barnett and Zürcher, (n 23).

<sup>25</sup> See J. Stromseth, D. Wippman, and R. Brooks (n 1) pp. 134 -177.

<sup>26</sup> See also A. Orford, 'Book Review Article: International Administration and the Management of Decolonisation', (2010) 59 *ICLQ* 227 – 249 at 248.

<sup>27</sup> See, e.g., T. Pietz and L. von Carlowitz, 'Local Ownership in Peacebuilding Processes in Failed States', (Report of Expert Meeting, April 2007), *ZIF Report* 12/07, available at <<http://www.zif-berlin.org/en/projekte/local-ownership-project.html>> (accessed 23 July 2010); De Brandabere (n 2)

the people. This article focuses on two rationales for efforts to improve this aspect of local ownership.

(i) Stable post-conflict situations

It is generally accepted that where the people of a post-conflict situation feel they have ownership of the reconstruction process, this will help to foster goodwill, rather than resistance, towards the outcomes.<sup>28</sup> Accordingly, any initiatives that seek to enhance local ownership have the potential to have a positive impact on the stability of the post-conflict situation, as they will increase support for the reconstruction process amongst the population. The decision to initiate international involvement is no exception to this idea. In fact, the more the population are involved in identifying what is required in terms of external assistance, the less likely they are to be concerned by the inevitable distance between their views and the decisions that are subsequently taken on reconstruction by an internationally facilitated administration.

Still, an important point to stress is that the stability of the post-conflict setting is best served by the efforts at local ownership being tailored to the context.<sup>29</sup> More direct consultation with the population,<sup>30</sup> or more effort to identify a government with a meaningful claim to be an embodiment of the will of the people, could both help to bring the decision to initiate international involvement closer to the will of the people. Nevertheless, if these efforts are not implemented with sensitivity to contextual factors – such as the cause of the conflict, strength of the peace, size of the territory, ethnic makeup of the population, and the level to which state and civil infrastructure have been devastated –<sup>31</sup> there is the possibility that overall they will have a detrimental, rather than beneficial, effect on the volatility of the situation. For instance, greater levels of popular consultation could delay the initiation of international involvement deemed necessary to secure a tentative arrangement for peace.

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<sup>28</sup> See, e.g., Hansen (n 3) at 135.

<sup>29</sup> See work cited above at (n 6); on the importance of context for the approach taken to the actual decisions on change and development of state and civil infrastructure in post-conflict situation, see B Hughes and C Hunt, 'The Rule of Law in Peace and Capacity Building Operations: Moving beyond a Conventional State-Centred Imagination', (2009) 13 *Journal of International Peacekeeping* 267 – 293; A Ghani and C Lockhart, *Fixing Failed States: A Framework for Rebuilding a Fractured World* (OUP, Oxford 2008) 169; UN Doc S/2004/616, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' p. 6; with regard to the implications of context for the creation of a legal blueprint for reconstruction see C Stahn, 'Jus Post Bellum: Mapping the Discipline(s)', in Stahn and JK Kleffner (n 3) 93-11 at 108; see also N Bhuta, 'New Modes and Orders: The Difficulties of a Jus Post Bellum of Constitutional Transformation', (2010) 60 *University of Toronto Law Journal* 799-854 at 849; on the potential relevance of context for criminal justice in post-conflict situations, see R Cryer 'Post-Conflict Accountability: a Matter of Judgement Practice or Principle', in White and Klassen (n 19) 267 -289 at 269.

<sup>30</sup> On consultation as one of a number of possible approaches for enhancing the proximity of decision making on reconstruction by an international administration, see C. Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond* (CUP, Cambridge 2008) 717 – 729; Salamum (n 7) 181-187; De Brandabere (n 2) 300.

<sup>31</sup> For consideration of the relative importance of different factors in post-conflict settings, see, in particular, Marenin (n 6); also R Wedgwood and HK Jacobson, 'State Reconstruction after Civil Conflict: Symposium (Foreword)', (2001) 95 *AJIL* 1 -6.



## (ii) Self-determination

The second rationale for local ownership stems from the current condition of international society. The nature of the state system has progressed from a time when it was accurate to conceive of international society as purely ‘an association of independent and diverse political communities, each devoted to its own ends and its own conception of the good’.<sup>32</sup> Currently, states have more values in common, than ever before. And a common concern for matters such as security and human rights helps to explain: ‘the move to institutions and expansion of global rule making; changes in the making, development, and justification of international law; the increasing emphasis placed on the enforcement of international norms and rules; and a changed understanding of the state and sovereignty.’<sup>33</sup> Still, the depth of agreement on shared values is variable, and many topics, such as when and how it is appropriate to intervene in the affairs of another state, remain divisive. This underpins why, in spite of an increased solidarity amongst states, the aspect of the principle of self-determination that posits that the people of a state as a whole should be free, within the boundaries of the state, to determine, without outside interference, their social, political, economic, and cultural infrastructure, continues to be central to the preservation of international order.<sup>34</sup> Accordingly, one can appreciate Hurrell’s argument that ‘[t]he global political order remains heavily structured around inherited pluralist mechanisms that are, by any standards, deficient and deformed, certainly when measured by the values which international society aspires but very often even by the more minimalist goals and values of the earlier period.’<sup>35</sup> The issue of whether and how international actors should engage in post-conflict situations brings the difficulties that surround an international society consisting of both solidarist and pluralist elements into focus.

In post-conflict situations, the absence of a domestic government that can sustain public order is problematic from the perspective of the realisation of human rights, as the state will not be able to meet the needs of the population.<sup>36</sup> The lack of effective governance also creates

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<sup>32</sup> T Nardin, *Law, Morality and the Relations of States* (Princeton, NJ: Princeton University Press, 1983) p 9, cited by A Hurrell, *On Global Order: Power, Values, and the Constitution of International Society* (OUP, Oxford, 2007) p 298.

<sup>33</sup> Hurrell (n 32) 58 and 59.

<sup>34</sup> J Waldron, ‘Two Conceptions of Self-Determination’, in S Besson and J Tasioulas (eds) *The Philosophy of International Law* (OUP, Oxford 2010) 397 –413 at 406; see also Hurrell (32) 28 and 177; BR Roth, ‘The Enduring Significance of State Sovereignty’, (2004) 56 *Florida Law Review* p. 1017 at 1038 and 1042; it should be noted that this reference to international order is meant more in the traditional sense, with order, as described by R Foot, ‘Introduction’, in R Foot, JL Gaddis, and A Hurrell (eds) *Order and Justice in International Relations* (OUP, Oxford, 2003) 1 – 23 at 3, ‘based on the protection of societal difference and of values associated with the state system.’; this is in contrast to more expansive conceptions which seek to give precedence to the interests of non-state actors, particularly individuals, see, for instance, R McCourquodale, ‘International Community and State Sovereignty: An Uneasy Symbiotic Relationship’, in C Warbrick and S Tierney (eds) *Towards an International Legal Community: The Sovereignty of States and the Sovereignty of International Law* (BIICL, London, 2006) 241 - 265.

<sup>35</sup> A Hurrell, ‘Order and Justice in International Relations: What is at Stake?’, in Foot, Gaddis, and Hurrell (n 34) 24 – 48 at 48.

<sup>36</sup> See G Kreijen, *State Failure, Sovereignty and Effectiveness* (2004) p. 87.

problems for international security, for example, terrorist training camps might be established or any disorder might spread to bordering territories.<sup>37</sup> Consequently, for a solidarist international society committed to international security and human rights, there is an imperative for international engagement in post-conflict situations to help restore long-term, effective, and peaceful domestic governance. However, the level of international involvement that is necessary to make a significant difference is likely to conflict with the principle of self-determination,<sup>38</sup> which is central to a pluralist understanding of international society. Ultimately, then, in terms of generating international support and acceptance for large-scale international engagement in post-conflict reconstruction, the solidarist vision of international society is competing with the pluralist conception.

Evidence of this can be found in a debate on the role of the UN in post-conflict reconciliation. Although all participating states identified ways in which the UN could contribute, there was a range in the levels of direct engagement and influence that the various states identified. For instance, Germany highlighted that on occasion there would need to be an extensive UN contribution, which would likely include some or all of the following:

‘the creation of tribunals and truth and reconciliation commissions, assistance in organizing and holding free and fair elections, assistance in drawing up a new, integrative constitution, joint demilitarization and demining, as well as the complete range of disarmament, demobilization and reintegration programmes for excombatants of former civil war enemies, and the mobilization of international financial and technical assistance for post-conflict economic and social reconstruction plans.’<sup>39</sup>

Germany also stressed that where there is a lack of political will from local decision makers, ‘it may be one of the most delicate and challenging tasks for the United Nations to inspire among local policy-makers and conflict-torn populations the confidence necessary to make the policy choices that hold the promise of a just and more prosperous future. Indeed, the United Nations has a unique legitimacy to do so.’<sup>40</sup> In contrast, the Chinese statement emphasised that, even when it is the United Nations that is taking action, ‘[n]othing should be imposed upon them [the local decision makers].’<sup>41</sup> It is here that local ownership has another important role.

More specifically, efforts at local ownership can be seen as a means of encouraging states with a more pluralist outlook to accept internationally facilitated post-conflict reconstruction

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<sup>37</sup> See UN High-level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility*, UN Doc. A/59/565 (2004), p. 25.

<sup>38</sup> See Caplan (n 5); also ‘Universal Realization of the Right of Peoples to Self-Determination’, UN Doc GA Res. 58/161, 22 Dec. 2003, at para. 2; Wheatley (n 12) 540.

<sup>39</sup> UN Doc. S/PV 4903, 26 January 2004, ‘Post-conflict national reconciliation: role of the United Nations’, at 12 – 13.

<sup>40</sup> (n 39)

<sup>41</sup> (n 39) at 29.

processes. This is because by bringing internationally facilitated post-conflict reconstruction closer to the will of the people, local ownership initiatives reduce the extent of the neglect of the principle of self-determination.<sup>42</sup> Consequently, local ownership is a means of not only increasing the provisions of resources for the reconstruction process, but also reducing the prospect of obstructive behaviour, such as the blocking of vital Security Council resolutions.

It should also be noted that, in contrast to the rationale of a stable post-conflict situation, in order to improve consistency with the political principle of self-determination, there is no inherent reason why efforts at local ownership should take account of the context. For instance, regardless of the volatility of a situation, more consultation with the people will still improve the consistency of the decision to initiate international involvement with the principle of self-determination. Still, in terms of galvanising international acceptance and support, there are likely to be some situations where wider international opinion will be less concerned about self-determination, than others. That is, it is reasonable to expect the importance of consistency with self-determination for generating international support to be in inverse correlation with the magnitude of the threat to international security and human rights.

### ***B. A Useful Role for International Legal Regulation of Local Ownership?***

In the light of the persuasiveness of these two rationales for improving local ownership, it is rational to consider why there would be a need for international legal regulation. There are a number of ways that international legal regulation might make a useful contribution. For instance, international legal regulation could provide a basis for responding to an abuse of authority, such as a complete lack of concern for the will of the people by the lead actors. Legal regulation could also be expected to incentivise efforts to identify popular opinion. Moreover, the existence of a legal framework could offer some reassurance to the population that the decisions related to the initiation of international involvement would be made responsibly.<sup>43</sup> Still, the relationship between the nature of the context and the usefulness of efforts at local ownership for the stability of the situation provides a reason to be concerned that legal regulation might also create complications.

The importance of context would not remove the scope for international legal regulation to make a useful contribution to local ownership from the perspective of the stability of a post-

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<sup>42</sup> This idea finds support in the work of moral theorists who have addressed the normative tension surrounding post-conflict situations. The tension is a reference to the importance of political stability – which international involvement can help bring to a situation – conflicting with the importance of respect for the autonomy of the political community – which is restricted by international involvement. Local ownership is a common feature of the recommendations for reducing the tension. See, e.g., S Recchia, ‘Just and Unjust Postwar Reconstruction: How Much External Interference Can Be Justified?’, 2009 *Ethics and International Affairs* 165 – 187 at 183; B Orend, ‘*Jus Post Bellum*: The Perspective of a Just-War Theorist’, (2007) 20 *LJIL* 571 at 588 – 589.

<sup>43</sup> See also ND White, ‘Peace Operations’, in Chetail (n 2) 213 – 227 at p 225 highlighting the importance for the legitimacy of peace operations that the international component is not seen by the affected population as above the law.

conflict situation. However, a process along the lines of that proposed by Österdahl and van Zandel for the crafting of legal regulation for all aspects of the post-conflict situation, to serve the purpose of a just and durable peace, would appear wise.<sup>44</sup> Their idea is for agreement to be reached on aspects of post-conflict situations that require legal regulation from which no-derogation is permitted, as well as on those aspects that could benefit from a more selective approach to legal regulation.<sup>45</sup> Even if just one aspect of the post-conflict environment was focused on, this would be a demanding project.<sup>46</sup> But potentially more problematic than motivating states to partake in the drafting process, would be the creation of a legal framework for local ownership that could be seen as appropriate for the stability of a situation and also provide a minimum level of self-determination for the people. The problem here stems from the fact that it is conceivable that in particular situations stability will be best served, for a time at least, with absolutely no local ownership.<sup>47</sup>

It is not the purpose of this article to attempt to propose a new legal framework that balances concern for the stability of the situation with the principle of self-determination. Rather this article is interested in the suitability of the existing legal framework for local ownership of the initiation of international involvement, which strikingly has not been crafted with the post-conflict setting in mind. In fact, this framework is centred on the legal right to self-determination, which emerged in the 1960s in the period of decolonisation, and reflects the importance of the political principle of self-determination for the international society of states.

The fact that the law of self-determination was formed before the examples of large-scale international involvement in post-conflict reconstruction over the last twenty years is far from encouraging, in terms of it making a useful contribution. Certainly, concern is reasonable with regard to the potential for the law to have affected the stability of post-conflict situations. In particular, there is reason to be concerned that the law may overly limit the freedom of international actors to take contextual factors into account, when determining whether they have sufficient evidence of what sort of external support, if any, the people desire. However, in light of the level of debate and disagreements that continue to surround the meaning of the international legal concept of self-determination,<sup>48</sup> it should also not be assumed that the legal framework ensures a meaningful level of self-determination for the people within a post-conflict territory.

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<sup>44</sup> I Österdahl and E van Zandel, 'What Will *Jus Post Bellum* Mean? Of New Wine and Old Bottles', (2009) 14 *JCSL* 175 – 207; for a critique of the project to treat *jus post bellum* as an international legal concept see E de Brabandere, 'The Responsibility for Post-Conflict Reforms: A Critical Assessment of *Jus Post Bellum* as a Legal Concept', (2010) 43 *Vanderbilt Journal of Transnational Law* 119-149.

<sup>45</sup> Österdahl and E van Zandel (n 44) p18.

<sup>46</sup> See Orend (n 42) 591.

<sup>47</sup> See Chesterman (n 6)

<sup>48</sup> See M Weller, *Escaping the Self-Determination Trap* (Martinus Nijhoff, Leiden, 2008) 22-29; A Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (CUP, Cambridge, 2003) 127; G. Simpson, 'The Diffusion of Sovereignty: Self-Determination in the Post – Colonial Age', 32 *Stan. JIL* (1996) pp. 257–58; H. Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation Of Conflict Rights* (University of Pennsylvania Press, Philadelphia 1990) 27.

### **3. The Legal Framework for Local Ownership of the Initiation of International Involvement in Post-Conflict Reconstruction**

The foregoing has shown that there is some scope for an international legal standard for local ownership of the initiation of international involvement in post-conflict reconstruction to be useful. However, it is also apparent that the need to accommodate two concurrent, but not entirely coextensive, rationales in the same legal framework complicates matters. On the one hand, if the legal standard is too demanding with regard to evidence of the will of the people, it can be expected to hinder the scope for the sort of international engagement in post-conflict reconstruction that can appear central to the stability of a situation. On the other hand, if the law does not set requirements in terms of evidence of the will of the people, there might be a lack of effort, which would represent a disregard for the principle of self-determination and, as a consequence, lead to a reduction in the level of wider international acceptance of the practice.

This section considers the existing substantive law of self-determination and the associated mechanisms for accountability. A core concern is the relevance of this legal framework for both a stable situation and the preservation of meaning in the notion of self-determination of the people that is at stake. It is first necessary to clarify the meaning of the legal right to self-determination, its link with the political principle of self-determination, and its relationship with the other legal bar to large-scale international involvement in post-conflict reconstruction, state sovereignty.

#### ***A. The Legal Right of all Peoples to Self-Determination and State Sovereignty***

The commitment of the international society of states to the self-determination of all peoples was demonstrated with the signing of the UN Charter in 1945. Article 1 (2) of the UN Charter states that one of the purposes of the United Nations is to pursue the development of friendly relations among nations ‘based on respect for the principle of equal rights and self-determination of peoples.’ The UN Charter lacks elaboration on the intended meaning of self-determination. Its inclusion has been explained as a means of promoting genuine self-government for all peoples,<sup>49</sup> but at this point in history there was not a legal right to self-determination. The development of the legal right to self-determination has occurred subsequent to the signing of the UN Charter, through a number of General Assembly Resolutions and its inclusion as Common Article 1 in the two International Covenants of Human Rights.<sup>50</sup>

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<sup>49</sup> See R. Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press, Oxford 1995) 111.

<sup>50</sup> UN Doc GA Res 1514 (XV) (1960), UN Doc A/RES/1514 (XV); UN Doc GA Res. 2625, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, 24 October 1970; International Covenant on Civil and Political Rights 1966; International Covenant on Economic, Social and Cultural Rights 1966; see also *Legal Consequences for*

The backdrop to the crystallisation of the legal right to self-determination was the movement for decolonisation during the 1960s.<sup>51</sup> This helps to explain why, in spite of self-determination as a political principle having a number of different dimensions, the core meaning of the legal right to self-determination centres on the idea of freedom from subjugation. More specifically, the Declaration on the Granting of Independence (1960) states that ‘the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental rights, is contrary to the Charter of the United Nations.’ And provides that ‘all peoples have the right to self-determination, by virtue of their right they freely determine their political status and freely pursue their economic, social and cultural development.’ This is the basis for a people subject to colonial rule to be given the choice of how they wish to be constituted: independence, integration, or association.<sup>52</sup>

It is now readily accepted that the legal right to self-determination also applies beyond the colonial context.<sup>53</sup> However, the broad formulation of ‘all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development’, which is repeated in almost all the relevant UN documents, underpins why its meaning has been and continues to be the source of considerable contestation.<sup>54</sup> Given the various layers of meaning that it is possible to extract from the common formulation of the right to self-determination, it is important to clarify the sense in which the legal right to self-determination is understood for the purposes of this article. In this respect, a useful approach involves contrasting self-determination as a political principle with its status in international law.

As a political principle, self-determination has at least three key dimensions. One is that the people of a state as a whole should be free, within the boundaries of the state, to determine, without outside interference, their social, political, economic, and cultural infrastructure.<sup>55</sup> Another is focused on each ethnically or culturally distinct group, being free to choose how it constitutes itself.<sup>56</sup> And a third is that a state should be constituted along democratic lines to

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*States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, *ICJ Reports* (1971) p. 16 at p. 31.

<sup>51</sup> See Weller (n 48) 35; J Salmon, ‘Internal Aspects of the Right to Self-Determination: Towards a Democratic Legitimacy Principle?’, in C Tomuschat (ed) *Modern Law of Self-Determination* (Nijhoff, Dordrecht 1993) 253 – 282 at 254-255.

<sup>52</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, *ICJ Reports* 1971, p. 16, at pp. 31-32, paras. 52-53

<sup>53</sup> See J. F. Gareau, ‘Shouting at the Wall: Self-Determination and the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory’, 18 *LJIL* (2005) p. 500.

<sup>54</sup> Weller (n 48) 23; see also D Cass, ‘Re-thinking Self-Determination: A Critical Analysis of Current International Law Theories’, (1992) *Syracuse Journal of International and Comparative Law* 21 at 22-23: ‘The point has been reached where, borrowing from [the legal theorist] Hart, the “penumbra of uncertainty” surrounding the concept of self-determination is so pronounced that it obscures the term’s “core of settled meaning”.’

<sup>55</sup> Waldron (n 34) 406.

<sup>56</sup> Waldron (n 34) 398.

enable the people to participate in the state's social, political, economic, and cultural systems.<sup>57</sup>

Attempts have been made, with varying levels of success, to identify each of these dimensions within the international legal concept of self-determination. The second dimension, on particular groups, is a potential challenge to the territorial integrity of existing states and the stability of the international system. This underpins why, although it is often invoked by liberation groups that seek to align their cause with peoples that are subject to colonial rule, it has received little support amongst states, at least in the sense of a right to secession for such groups.<sup>58</sup> The democratic dimension has been more successful in gaining the support of states and scholars,<sup>59</sup> but it is still, arguably, some way off being an accepted point of law.<sup>60</sup> This is not least because of the definitional difficulties that surround the debate about democracy as an international legal concept.<sup>61</sup> By far the most successful, in terms of the recognition by states of its international legal status, has been the first dimension. Thus not only is it deemed politically important but it is also an international legal requirement that the population of a state as a whole be free to 'determine, without external interference, their political status and to pursue their economic, social and cultural development'.<sup>62</sup> The exact point at which the level of international influence over the internal affairs of a state would contravene this aspect of legal right to self-determination is difficult to ascertain. It is

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<sup>57</sup> See, on President Wilson's conception of the principle self-determination, which is often referred to in discussion about democracy and self-determination, M Pomerance, 'The United States and Self-Determination: Perspectives on the Wilsonian Conception', (1976) 70 *AJIL* 1 at 17 and 20; A Cassese, *Self-determination of Peoples: A Legal Reappraisal* (CUP: Cambridge University Press, 1995) at 19; T Musgrave, *Self-Determination and National Minorities* (OUP, Oxford 1997) 22 – 24; see also Weller (48) p 23.

<sup>58</sup> See Weller (n 48) 31; for a discussion of the relationship between political theory on this aspect of self-determination and international law, see S Tierney, 'The Search for a New Normativity: Thomas Franck, Post-modern Neo-tribalism and the Law of Self-determination', (2002) 13 *EJIL* 941.

<sup>59</sup> See examples cited by J Vidmar, *The Right of Self-Determination and Multiparty Democracy: Two Sides of the Same Coin?* (2010) *Human Rights Law Review* 239 – 268 at 241 note 12; Weller (n 48) 23.

<sup>60</sup> See RA Miller, 'Self-Determination in International Law and the Demise of Democracy', (2003) 41 *Columbia Journal of Transnational Law* 601 at 621; Vidmar (n 59) 266 – 267;

<sup>61</sup> See Vidmar (n 59) 266 – 267; another problem with regard to the concretisation of content for the internal dimension of the legal right to self-determination is, as Fox has noted, 'because self-determination is such a controversial topic, the actors themselves rarely venture opinions on the nature of the right in their resolutions, reports, or diplomatic exchanges on the subject', GH Fox, 'Self-Determination in the Post-Cold War Era: A New Internal Focus?', (1995) 16 *Michigan Journal of International Law* 733 - 781 at 780; see also J. Klabbers, 'The Right to be Taken Seriously: Self-Determination in International Law', (2006) 28 *Human Rights Quarterly* 186-206 at 204- 205, querying the utility of seeking to merge a group right, self-determination, with an individual right, political participation.

<sup>62</sup> GA Res. 2625, '[b]y virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every state has the duty to respect this right in accordance with the provisions of the Charter.'; Common Article 1(2) of the Human Rights Covenants; see also UN Human Rights Committee, General Comment No. 12, adopted 13 Apr. 1984, U.N., Hum. Rts. Comm., 21st Sess., U.N. Doc. HRI/GEN/1/Rev.1 (1994), paras. 1 and 4; R. Mullerson, *International Law, Rights and Politics: Developments in Eastern Europe and the CIS* (Routledge, London 1994) 90-91; R. Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press, Oxford 1994) 104; A Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (CUP, Cambridge 1995) 59 ; for criticism of the concept of people that this generally accepted understanding of the right to self-determination reflects, see R McCorquodale, 'Self-Determination: A Human Rights Approach', (1996) 43 *ICLQ* 857 at 867; for discussion of criteria for identifying which individuals qualify as part of the people, when the definition is the population of the state as a whole, see Fox (n 61) 761.

sufficient to note that any circumstance in which governance was completely dependent on international actors would violate the right to self-determination;<sup>63</sup> this is subject to there being no valid consent for the international efforts (a point returned to below).

The willingness of states to embrace this dimension of self-determination as part of international law can be explained by the ethical reinforcement it provides for the traditional legal structures for order amongst a pluralist international society of states, which are founded on respect for the territorial integrity and political independence of other states.<sup>64</sup> In this respect, it is important to highlight that the right to self-determination has an obvious overlap with the international legal concept of sovereignty. Specifically, under international law, a state has its own right to ‘freely choose and develop its political, social, economic and cultural systems’.<sup>65</sup> This overlap is support for the idea of popular sovereignty.<sup>66</sup> Popular sovereignty is the idea that sovereignty is now better seen as the consummation of the self-determination of people, rather than something that is worth protecting for its own sake. Yet, in spite of a long history of governments subscribing to the concept of popular sovereignty,<sup>67</sup> popular sovereignty has yet to be fully reflected in international law, which continues to separate out the rights of the state from the rights of the people.<sup>68</sup> Thus there are two international legal concepts which serve to prohibit large-scale international engagement in post-conflict reconstruction.<sup>69</sup>

Crucially, neither the legal right to self-determination nor the international legal concept of sovereignty is absolute. It is an inherent feature of sovereignty as an international legal concept that the exercise of sovereign rights can be contracted out.<sup>70</sup> That is, while the state has the right to decide on its infrastructure, it is consistent with sovereignty for the state to invite an external actor to exercise aspects of this right. This is reflected in the fact that state consent can serve as a legal justification for otherwise wrongful activity in international law;<sup>71</sup> particularly when the lack of consent is seen as central to the definition of wrongful intervention in international law.<sup>72</sup> The same logic applies with the right of the people to self-

<sup>63</sup> See Fox (n 11) 208-209; also works cited at (n 38).

<sup>64</sup> See Roth (n 34) 1048; Weller (n 48) 30 – 31.

<sup>65</sup> UN Doc GA Res. 2625, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, 24 October 1970.

<sup>66</sup> See Roth (n 34) 1042; C Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century’, 281 *Recueil des Cours* (1999) p. 9 at p. 165; Mullerson (n 62) pp. 90-91; A Rosas, ‘Internal Self-Determination’, in Tomuschat (n 51) 225 – 252 at 250 – 251.

<sup>67</sup> BR Roth, ‘Popular Sovereignty: The Elusive Norm’, (1997) 91 *Proceedings of the American Society of International Law* 363.

<sup>68</sup> M Jamnejad and MC Wood, ‘The Principle of Non-Intervention’, (2009) 22 *LJIL* 345-381 at 369; see also Cassese (n 57) 55; B. Conforti, ‘The Principle of Non-intervention’, in M. Bedjaoui (ed) *International Law: Achievements and Prospects* (Nijhoff, Dordrecht, 1991) 467-482.

<sup>69</sup> See also WG Werner, ‘Self-Determination and Civil War’, (2001) 6 *JCSL* 171 – 190.

<sup>70</sup> *Case of the SS ‘Wimbledon’*, PCIJ Series A. No. 1, 1923, p. 25; the contracting out must be within reason, of course, if the state wants to remain a state, see BR Roth, ‘The Illegality of Pro-Democratic Invasion Pacts’, in GH Fox and BR Roth (eds), *Democratic Governance in International Law* (CUP, Cambridge 2000) 328 at 330.

<sup>71</sup> See Article 20 of the International Law Commission’s Draft Articles on State Responsibility, with Commentaries, Report of the International Law Commission, 53rd session, UN Doc. A/56/10 (2001) available at < [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf)>.

<sup>72</sup> D. Wippman, ‘Military Intervention, Regional Organization, and Host State Consent’, (1996) 7 *Duke J. Comp. & Int’l L.* 209 at 210; cf. R. Ago, Eighth Report on State Responsibility, UN Doc. A/CN.4/318 (1979)



determination. The people have the right to decide on the infrastructure, but if the people want an internationally enabled governance situation, even one without any room for domestic input, a request from the people renders such a situation consistent with the legal right to self-determination.<sup>73</sup> In this respect, it is useful to note that, leaving aside a UN Security Council chapter VII authorisation, direct international administration of a state without a consensual basis would, to a very large extent, be precluded by the law of occupation from introducing any significant changes to the state and civil infrastructure.<sup>74</sup> Here, the law of occupation can be seen as a source of protection for the people's right to self-determination in adverse conditions.<sup>75</sup> If there was valid consent for international administration, the law of occupation would not apply; instead the capacity to introduce change would be determined by the terms of the consent. More significant, for present purposes, is the question of what connection the source of consent must have to the will of the people for the consent to render international involvement consistent as matter of international law with the legal right to self-determination and sovereignty.

### ***B. A Request from the People for International Involvement?***

The will of the people is an abstract concept. As such, if the right to self-determination is to be exercised, in the sense of inviting international involvement in the change and development of state and civil infrastructure, there is a need for an agent, a government. Certain indicators can support a government's claim to be an embodiment of the will of the people. In particular, as was noted above, the ability to control the territory without resort to the threat of force and a democratic form would be useful signs that the people want a government to exercise their rights.

A number of approaches have been taken to the argument that the legal right to self-determination requires a democratic form of government.<sup>76</sup> For instance, it has been argued that the right to self-determination found in Article 1 of the International Covenant on Civil and Political Rights (ICCPR) should be read in conjunction with Article 25 the right to political participation, so that the right to self-determination is also breached if a government

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and Add. 1-4 Yearbook of the International Law Commission (1979) 31 – 32, suggesting that, in the case of intervention, consent suspends the normal operation of the rules.

<sup>73</sup> See A Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions', (2005) 16 *EJIL* 59 at 64.

<sup>74</sup> See M Saul, 'The Impact of the Legal Right to Self-Determination on the Law of Occupation as a Framework', in M Saul & S Shah-Davis (eds) *International Law and Armed Conflict: Challenges in the 21<sup>st</sup> Century* (TMC Asser Press, The Hague 2010) 398 - 415; cf. E. Benvenisti, 'The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective', (2003) 1 *Israeli Defense Forces Law Review* 19

<sup>75</sup> Saul (n 74); see also JL Cohen, 'The Role of International Law in Post-Conflict Constitution-Making: Toward a *Jus Post Bellum* for "Interim Occupations"', (2006/07) 51 *New York Law School Review* 498-532.

<sup>76</sup> It should be noted that Franck did not cast his commonly cited thesis on the emerging right to democratic governance as part of the legal right to self-determination. Rather, for Franck, the commitment of international society to the notion of self-determination was part of the explanation for the existence of the emerging right to democratic governance, see T Franck, *Fairness in International Law and Institutions* (1995) 92; Tierney (n 58) 944.

does not satisfy Article 25.<sup>77</sup> This argument finds some support in the Human Rights Committee's (HRC) General Comment on Article 25,<sup>78</sup> but this is in the sense that the two rights are closely associated rather than one and the same, and there is also a lack of explicit support in the text of the ICCPR or the *travaux préparatoires*.<sup>79</sup> More attention has been given to the meaning of the phrase 'possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour', which is found in the account of self-determination in the Declaration of Principles of International Law Concerning Friendly Relations, GA Res. 2625, 1970. The concept of representative here is ambiguous. As such, it could be interpreted as a requirement for a democratic form of government.<sup>80</sup> However, from the debate at the time of its adoption it is clear that this was at least not the intention of all parties, and subsequent practice also does not support the interpretation of representative as synonymous with democratic.<sup>81</sup> Accordingly, as a matter of international law, it is left to the entity with governmental status to represent the will of the people of the state for the purpose of the exercise of their right to self-determination as well as the will of the state for the exercise of its sovereign rights.<sup>82</sup>

In most cases, the government of a state will have independent effective control of the territory. Control is dependent on the compliance of the people, coerced or not. And the deference of a people to a government offers a basis for presuming that the people want it as their representative, however detached from reality this might be.<sup>83</sup> Where the government does not have independent effective control, provided it has not been lost as a result of external intervention, then the grounds for this presumption are extinguished. This can clearly be the case in post-conflict situations. Therefore it might be assumed that, in such circumstances, there would be no possibility of the legal right to self-determination being satisfied. That is, there would be no agent that could provide valid consent. However, as is now turned to, it is possible for the basis for governmental status to be detached from control of territory.<sup>84</sup>

<sup>77</sup> Cassese (n 57) 53; on the debate about the meaning of Article 25 ICCPR, see J Vidmar, 'Multi-party Democracy: International and European Human Rights Law Perspectives', (2010) 23 *LJIL* 209 – 240.

<sup>78</sup> General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25), 12/07/96, CCPR/C/21/Rev.1/Add.7

<sup>79</sup> See P. Thornberry, 'The Democratic Aspect or Internal Aspect of Self-Determination', in Tomuschat (n 51) 101 – 138 at p. 135; Rosas (n 66) 246; see also Klabbers (n 61); C Tomuschat, 'Democratic Pluralism: the Right to Political Opposition' in A Rosas and J Helgesen (eds) *The Strength Of Diversity: Human Rights And Pluralist Democracy* (Nijhoff, Dordrecht 1992) 27 – 47 at p. 39.

<sup>80</sup> See Cassese (n 57) 306.

<sup>81</sup> See Musgrave (n 57) 100-102; Thornberry (n 79) 120.

<sup>82</sup> See Vidmar (n 59) 268; Cf. A. Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions', (2005) 16 *EJIL* 59 at 81: '[i]n order to validly commit the Iraqi people through the allocation of oil contracts, the government in question must be elected by the people, as required by the right to self-determination and the attendant permanent sovereignty over natural resources.'; A. Orakhelashvili, 'The Post-War Settlement in Iraq: The UN Security Council Resolution 1483 (2003) and General International Law', 8 *JCSL* (2003) 307 at 313.

<sup>83</sup> See Roth (n 17) 202; SD Murphy, 'Democratic Legitimacy and the Recognition of States and Governments', in Fox and Roth (n 70) 139; see, though, statement by United Kingdom representative to Third Committee of the General Assembly 12 Oct. 1984 ((1984) 55 *BYIL* 432): 'Many peoples today are deprived of their right of self-determination, by elites of their own countrymen and women: through the concentration of power in a particular political party, in a particular ethnic or religious group, or in a certain social class'.

<sup>84</sup> On the distinction between a legitimate government in political terms and the concept of governmental status in international law, see S Talmon, 'Who is a Legitimate Government in Exile? Towards Normative Criteria for

As the ICJ has noted: '[a]ccording to international law, there is no doubt that every Head of State is presumed to be able to act on behalf of the State in its international relations (see for example the Vienna Convention on the Law of Treaties, Art. 7, para. 2 (a))'.<sup>85</sup> There is no mention of effective control here or in the noted provision of the Vienna Convention on the Law of Treaties, but, of course, the period of political flux in the aftermath of war might entail that there is no longer a head of state or that there are competing claims to be the head of state. In such circumstances, international law is hardly helpful. The traditional position is to allocate governmental competence on the basis of effective control: understood as the ability to maintain public order on the territory.<sup>86</sup> Noticeably, one of the faults of the effective control test is the fact that it is a relative test, 'effective enough'.<sup>87</sup> This means that provided a government has a modicum of independent effective control of the post-conflict state, there is a basis for it to retain or claim the credentials to be treated as the agent of the state and its people. However, given the likelihood of a complete lack of control in a post-conflict situation, this test might still be of little utility.

Alternatively, Article 21 of the Universal Declaration of Human Rights, 1948, might be seen as a challenge to the effective control approach to governmental status, as it provides that: 'the will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent voting procedures.' There are, though, a number of reasons why this provision is not as significant as it might at first appear. In particular, the document was of a political rather than a legal nature and a number of states chose to abstain.<sup>88</sup> Still, there is another, more persuasive, explanation for why it may be possible to source of valid consent for international involvement in post-conflict situations: international recognition.

Recognition of governmental status by other states, or more accurately other governments, is commonly seen as declaratory, rather than constitutive, of governmental status.<sup>89</sup> However, even with the declaratory view, international recognition still serves as evidence of status. Consequently, it can help to bolster the claim of a government with only a splattering of control of the territory. Or, to all intents and purposes, establish the status of a government that has never enjoyed independent effective control.<sup>90</sup> It can also operate in the opposite direction to block the status of an entity that has some degree of effective control over the

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Governmental Legitimacy in International Law', in G.S. Goodwin-Gill and S. Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie* (Clarendon Press, Oxford 1999) 499 at 537.

<sup>85</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgement, ICJ Reports 1996, p. 595, at pp. 621-2.

<sup>86</sup> Tinoco Arbitration (Great Britain and Costa Rica) (1923) 1 R.I.A.A. 375; M. J. Peterson, *Recognition of Governments: Legal Doctrine and State Practice, 1815-1995* (St Martins Press, New York 1997) 37 and 49.

<sup>87</sup> On the subjectivity of the effective control test see M. Aristodemou, 'Choice and Evasion in Judicial Recognition of Governments: Lessons from Somalia', (1994) 5 *EJIL* 532.

<sup>88</sup> Roth (n 17) pp. 329-332; cf. GH. Fox, *Election Monitoring: The International Legal Setting*, (2001) 19 *Wis. Int'l L.J.* 295, 311-12.

<sup>89</sup> Peterson (n 86); Salmon (n 51) 260.

<sup>90</sup> See J d'Aspremont, 'Legitimacy of Governments in the Age of Democracy', (2006) 38 *N.Y.U. Journal of International Law & Politics*, 877-918 at 903.

territory.<sup>91</sup> Some states have a policy not to offer explicit recognition of governments, seeing it as interference in the internal affairs of a state.<sup>92</sup> Nonetheless, such states have still been willing to use recognition where it suits their interests.<sup>93</sup> Moreover, the significance of adopting a policy of not offering explicit recognition is further mitigated by the fact that, as far as governmental status is concerned, international relations serve a similar role.<sup>94</sup>

A key factor explaining international recognition of struggling governments has been their democratic credentials.<sup>95</sup> However, it remains that international recognition is not limited by any criteria for democracy.<sup>96</sup> For instance, non-democratic governments continue to be recognised,<sup>97</sup> and it has been the case that a fledgling government will secure recognition merely through the promise to hold elections in the future.<sup>98</sup> This means that it is possible for states to disagree and, consequently, for international opinion to be split on whether an entity has governmental status.<sup>99</sup> Most pressingly, for present purposes, it also entails that there is scope for a government with very little claim to be an embodiment of the will of the people to be granted the international legal capacity to initiate large-scale international involvement in post-conflict reconstruction.

In this respect, it is important to highlight that there has been debate about whether consent to military intervention from ineffective but internationally recognised governments is valid under international law. The case for such law has a strong conceptual logic: identity of the agent for the rights of the state and its people is uncertain so international actors should not be permitted under international law to become involved with activity that affects these rights.<sup>100</sup> The rule's existence has been contemplated for the civil war context,<sup>101</sup> as well as for when control has never existed or has been lost without a direct assault on the authority of the government.<sup>102</sup> However, the strength of the rule has always struggled in the civil war context. This is primarily because of the ease by which those accused of violating it can claim

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<sup>91</sup> See Roth (n 17) 377 and 419.

<sup>92</sup> Salmon (n 51) 262.

<sup>93</sup> Peterson (86) 182; C Warbrick, 'States and Recognition', in M Evans (ed), *International Law* (OUP, Oxford 2006) 221 at 256.

<sup>94</sup> See J Crawford, *The Creation of States in International Law* (OUP, Oxford, 2006) 152; S Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (OUP, Oxford 1998) 5-7; see also the steps taken by the UK to portray its dealings with the Taliban, when the latter exercised a degree of effective control in Afghanistan, as not inter – governmental, UKMIL 72 BYIL (2001) p. 578.

<sup>95</sup> d'Aspremont (n 90) at 901 – 902; Murphy (n 83) 146.

<sup>96</sup> Roth (n 17) 419; Murphy (n 83) p 153; Salmon (n 51) 260 see also at 277 – 278 for consideration of possible consequences of a democracy based test for governmental status.

<sup>97</sup> See d'Aspremont (n 90) p. 888; Murphy (n 83) 150.

<sup>98</sup> See d'Aspremont (n 90) p. 902

<sup>99</sup> See d'Aspremont (n 90) p. 879 fn. 4; Roth (n 17) 285.

<sup>100</sup> L Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government', (1985) 56 *BYIL* 189 at 200-211.

<sup>101</sup> See Doswald-Beck, (n 100); A Tanca, *Foreign Armed Intervention in Internal Conflict* (Nijhoff, Dordrecht 1993); D. Acevedo 'The Haitian Crisis and the OAS Response: A Test of Effectiveness in Protecting Democracy', in L Damrosch (ed), *Enforcing Restraint – Collective Intervention in Internal Conflicts* (Council on Foreign Relations Press, New York) 119 at 139; Werner (n 69)

<sup>102</sup> Institut De Droit International, 10th commission: Present Problems of the Use of Force in International Law, D. Sub-group on Intervention by Invitation, Rapporteur G. Hafner (2007)

there had already been external assistance for the other side that can justify further involvement on the basis of collective self-defence.<sup>103</sup> Moreover, a recent study by the *Institut De Droit International* found that there is also little evidence for such a rule away from the civil war context.<sup>104</sup> In sum, this debate highlights a possible basis for a challenge to the legal capacity of an ineffective but internationally recognised post-conflict government to provide consent to an international military presence intended to keep it in authority. The debate also reveals, however, that presently the legal grounds for such a challenge remain doubtful.

It is apparent, then, that it is possible for the initiation of large-scale international involvement in post-conflict situations to be reconciled with the right to self-determination as a matter of international law. This requires a valid consensual basis. It is also evident, though, that satisfying this legal requirement of self-determination might contribute little in terms of meaningful local ownership of the decision. This is because it is possible for governmental status to rest on little more than international recognition, and international recognition is not limited by specific criteria directed at assessing the claim of a government to be an embodiment of the will of its citizens.<sup>105</sup> One consequence of the present condition of the substantive law in this area is that it should not be assumed that consistency with the law will be treated by wider international society as a sufficient attempt at reconciling the involvement in post-conflict situations with the underlying political principle of self-determination. Another consequence is that the potential for the law to contribute to the stability of the situation, in the sense of encouraging appropriate efforts with regard to local ownership of the decision to initiate external engagement, has hardly been utilised. In the light of these doubts about the relevance of the law for both the rationales that were highlighted in Section 2 above, it is reasonable to consider why international actors would, nonetheless, seek to comply with the legal right to self-determination.

### ***C. The Legal Right to Self-Determination and Mechanisms for Accountability***

The above discussion has highlighted that valid consent for international involvement in post-conflict situations is unlikely to be a reliable indicator of the true will of the people. However, this does not mean that it will have no bearing on the level of wider international acceptance

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<sup>103</sup> D Wippman, 'Military Intervention, Regional Organization, and Host State Consent', (1996) 7 *Duke J. Comp. & Int'l L.* 209 at 220; see also Tanca (n 101) 92; T. J. Farer, 'A Paradigm of Legitimate Intervention', in Damrosch (n. 101) 316 at 319; C. J. Le Mon, 'Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested', (2003) 35 *NYU Journal of International Law and Politics* 741 at 741.

<sup>104</sup> Institut De Droit International (n 102) 263.

<sup>105</sup> This possibility has been overlooked in some research on the idea of a *jus post bellum*. For instance, the capacity of consent to reconcile, in formal terms, international involvement in post-conflict reconstruction with the legal right to self-determination and the international legal concept of sovereignty, seems central to why Boon limits her call for a new ethical and legal framework for post-conflict reconstruction to situations of non-consensual direct international governance. K Boon, 'Legislative Reform in Post-Conflict Zones: Jus Post Bellum and the Contemporary Occupant's Law-Making Powers', (2005) 50 *McGill L.J.* 285 at 288; see also Cohen (n 75) 498.

of large-scale international involvement in a post-conflict situation.<sup>106</sup> The reason for this can be traced back to the idea of international society, which was highlighted above, as increasingly solidarist but still rooted to its pluralist foundations.

More specifically, an insistence on valid consent can be seen as way of mediating between these two competing conceptions of international society. On the one hand, the fact that it is still possible to source valid consent in the aftermath of war ensures that it remains possible for a practice that might be deemed central to solidarist interests of security and human rights to proceed. On the other hand, the fact that consent is required and that some effort will be necessary to source consent, can help to reduce the impression that, in condoning the practice, the wider international society of states is endorsing a lessening in the importance of the principle of self-determination as a general matter. In favour of this conception of the role of consent, is the long standing preference of certain members of the UN Security Council for there to be consent from a target state before they will agree to pass a chapter VII resolution authorising the deployment of a military presence, even though such consent may be of little more than nominal value.<sup>107</sup> For present purposes, the key point is that, if international actors want to maximise the level of support they receive for their involvement in a post-conflict situation, it is of central importance that consent that will satisfy the legal right to self-determination is obtained. What about prospective interveners that are less concerned with wider international acceptance, can they also be expected to attempt to satisfy the legal right to self-determination before commencing involvement in a post-conflict situation?

Here, the scope for lawful direct action to be taken in response would be important, and, in this respect, the secondary rules on state responsibility found in the International Law Commission's (ILC) Articles on State Responsibility are particularly notable.<sup>108</sup> The ILC Articles, in Part 2 Chapter III, set out some of the consequences that follow from serious breaches of obligations under peremptory norms of general international law. Chapter III covers law that prohibits conduct which is considered to present a challenge 'to the survival of states and their peoples and the most basic human values.'<sup>109</sup> The identification of law which has the requisite peremptory status remains the source of considerable debate.<sup>110</sup> A strong, but certainly not conclusive, indicator that the legal right to self-determination does have this status is found in its inclusion as an example of such a norm in the ILC's Commentaries on Chapter III.<sup>111</sup> This provides a basis for arguing that where there is a

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<sup>106</sup> For further discussion of the legitimacy of large-scale international involvement in post-conflict situations that highlights consent as an important factor, but does not address the relevance of a source of consent being valid under international law, see Zaum (n 21) 58-67.

<sup>107</sup> See D. Kritsiotis, 'Security Council Resolution 1101 (1997) and the Multi-national Protection Force of Operation Alba in Albania', (1999) 12 *LJIL* 511 at 528-529.

<sup>108</sup> '[T]he general conditions under international law for the state to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom', International Law Commission's Draft Articles on State Responsibility, with Commentaries, Report of the International Law Commission, 53rd session, UN Doc. A/56/10 (2001), p. 31, para 1.

<sup>109</sup> Commentary on Art. 40, para 3, International Law Commission's Draft Articles on State Responsibility (n 108).

<sup>110</sup> See D Shelton, Normative Hierarchy in International Law 100 *AJIL* 291 (2006) at 303.

<sup>111</sup> Commentary on Art. 26, para 5, International Law Commission's Draft Articles on State Responsibility (n 108); see also DJ Harris *Cases and Material on International Law* (Sweet and Maxwell, London 2004) 549;

serious breach, defined as a ‘gross or systematic failure by the responsible state to fulfil the obligation’ (Article 40), states are under a positive duty to co-operate to bring to an end through lawful means the breach and are also not obliged to recognise the situation (Article 41). There is a lack of clarity about the manner and extent to which the law would have to be breached to entail ‘serious’,<sup>112</sup> as well as whether there presently exists a positive obligation to act.<sup>113</sup> The point, though, is that, in contrast with most other aspects of international law, there would be, at the very least, a strong moral imperative for all members of the international society of states to take action to bring an infringement of the right to self-determination to an end.

In terms of the steps that could be taken under international law to bring a violation of the right to self-determination to an end, the ILC Articles indicate in Article 48 that for an obligation that is owed to the international community as a whole, such as the right to self-determination,<sup>114</sup> there is scope for any state invoking responsibility and calling for reparation for the injured party. The lawfulness of coercive countermeasures to ensure compliance is much more uncertain in relation to human rights instruments and obligations owed to the international community as a whole, than other multilateral instruments where states can be directly injured (e.g. Vienna Convention on Diplomatic Relations, 1961). This is reflected in the fact that Article 54, for when a state is not directly injured, refers only to lawful, rather than the more open approach in Article 49 which refers simply to countermeasures.<sup>115</sup> However, this has not stopped states taking, and international toleration of coercive countermeasures in extreme situations of human rights violations.<sup>116</sup>

International actors interested in involvement in post-conflict situations are unlikely to want to risk direct coercive measures being taken under the law of state responsibility. However, they are perhaps more likely to be deterred from abandoning the law of self-determination by the prospect of action, such as sanctions or a military response, being authorised at the UN Security Council under chapter VII. This would be a possibility if the external engagement was perceived as a threat to international peace and security, and the absence of a consensual basis would increase the chances of such an occurrence. Moreover, there would also be the potential for other states to interpret the action as an armed attack, and, consequently, come to the aid of the targeted state under the doctrine of collective self-defence. This would require an express request from the targeted state,<sup>117</sup> but it is worth highlighting that there is

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*Case concerning East Timor (Portugal v Australia)* [1995] ICJ Rep 90, Dissenting Opinion of Judge *ad hoc* Skubiszewski, at para. 135.

<sup>112</sup> See DJ Harris *Cases and Material on International Law* (Sweet and Maxwell, London 2004) 549

<sup>113</sup> See Harris (n 112) 550.

<sup>114</sup> *Legal consequences of the construction of a wall in the Occupied Palestinian Territory*, Advisory Opinion 9 July 2004, at para. 88.

<sup>115</sup> Article 49 permits suspension of other obligations owed to the state in question; see also CJ Tams, ‘Unity and Diversity in the Law of State Responsibility’, in A Zimmermann and R Hofmann (eds), *Unity And Diversity In International Law* (Berlin 2005) 435-458 at para 31.

<sup>116</sup> See Tams (n 115), para 31; also EP Katselli, *The Problem of Enforcement in International Law: Countermeasures, The Non-Injured State and the Idea of International Community* (Routledge, 2010)

<sup>117</sup> *Nicaragua (Merits)* [1986] ICJ Rep 14, p 120 para 232.

precedent for this requirement being waived where the delay it would bring would lead to devastating consequences for the state and its people.<sup>118</sup>

In sum, whether international actors have benevolent or more self-interested motivations for becoming involved in post-conflict reconstruction, there are strong legal and political reasons for why they would want to initiate their intervention in a manner that is consistent with the law of self-determination. This finding increases the significance of what the law of self-determination requires in terms of the initiation of international involvement, as it indicates that regardless of the implications for the stability of the post-conflict situation, international actors are not likely to proceed without at least attempting to comply. However, it is also apparent that the law of self-determination is far from demanding in what it requires as an expression of the will of the people for the initiation of large-scale international involvement. This reflects a lack of correspondence between the status that is afforded the principle self-determination (both in international politics and the fledgling normative hierarchy of international law) and the manner in which the norm has been developed as an international legal concept. In the normal run of things, the underdeveloped nature of the legal concept of self-determination is concealed by the fact that the government will have effective control of the state, which provides a basis for identifying it as the embodiment of the will of the people. In the post-conflict situation there is no effective government, and this has consequences for both the usefulness and sustainability of the law of self-determination as the legal framework for local ownership of the initiation of international involvement. These consequences can be illustrated through consideration of how the law relates to practice from the last twenty years.<sup>119</sup>

#### **4. The Practice of the Initiation of International Involvement in Post-Conflict Reconstruction**

In the practice post-conflict reconstruction, in spite of circumstances of political flux, the right to self-determination has not been abandoned. In some instances the commitment of the lead actors to the right to self-determination has been expressed in key documents and resolutions setting out the basis for international involvement and plans for how to enhance the transitional period.<sup>120</sup> More meaningful, however, in terms of attempts to render the practice consistent with the legal right to self-determination, have been the attempts to initiate involvement on a consensual basis.<sup>121</sup> In fact, over the last two decades, only in Iraq, when it

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<sup>118</sup> See ND White, 'Defending Humanity', (2009) 10 *Melbourne Journal of International Law* 379 – 393 at 388.

<sup>119</sup> For a critical reading of the position of the right to self-determination in the narrative that accompanied justification for international post-conflict reconstruction in Bosnia and East Timor, see A Orford (n 48) 126 – 143.

<sup>120</sup> See e.g., Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, UN Doc S/2001/1154 (5 Dec. 2001) (Bonn Agreement), preamble, 'Acknowledging the right of the people of Afghanistan to freely determine their own political future in accordance with the principles of Islam, democracy, pluralism and social justice,'; SC Res. 1483 (2003) (on the situation in Iraq and Kuwait) para. 4 'Stressing the right of the Iraqi people freely to determine their own political future and control their own natural resources'.

<sup>121</sup> See also Fox (n 11) 64- 69 listing the consensual basis for all UN post-conflict missions from 1988 to 2005.



was formally occupied by the coalition forces, has there been international engagement in a reconstruction process that undoubtedly operated without any consensual basis. In this instance, the Security Council arguably provided a legal basis for activity beyond the law of occupation;<sup>122</sup> but this did not remove the underlying inconsistency with the legal right to self-determination.<sup>123</sup>

It does not follow, of course, that all the other examples of post-conflict reconstruction have operated on valid consent. For instance, in relation to Kosovo and East Timor, while there was some evidence of consent from states with a claim to title over the territory in question (Federal Republic of Yugoslavia; Portugal and Indonesia),<sup>124</sup> the respective international administrations proceeded with only loose evidence of a desire for the initiation of the international involvement in the form it took from the affected people (earlier peace agreement signed by Kosovan leaders but not FRY; and vote for independence East Timor).<sup>125</sup> This brings into doubt the consistency of the initiation of the international involvement with the legal right to self-determination.<sup>126</sup> And this can help to explain why in both situations there was a broad chapter VII authorisation which covered not only the military presence, but also the internationally administered reconstruction process. It might also be queried whether governments that have been formed largely as a result of international initiatives, as has been the case in Afghanistan, Iraq, and Haiti, should have the competence to exercise the right of the people to self-determination.<sup>127</sup> However, in line with what was set out above about the consequences for governmental status that can follow from international recognition, the interim governments in these instances have all been treated as if they had the competence to offer valid consent to the international involvement.<sup>128</sup>

Still, in Afghanistan, Iraq, and Haiti and most of the other examples noted below, the request for international participation has been followed by a Security Council Chapter VII authorisation for at least – and often only for – the activities of the international military

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<sup>122</sup> See D. Scheffer, 'Future Implications of the Iraq Conflict: Beyond Occupation Law' 97 *AJIL* (2003) 842 at 845 - 854; see also K Kaikobad, 'Problems of Belligerent Occupation: The Scope of Powers Exercised by the Coalition Provisional Authority', (2005) 54 *ICLQ* 253.

<sup>123</sup> See Wheatley (n 12) 540; for analysis of the occupation of Iraq from the perspective of an international community that sits above the legal and political structures of international society, see R Buchan, 'International Community and the Occupation of Iraq', (2007) 12 *JCSL* 37.

<sup>124</sup> On the arguable invalidity of these expressions of consent as a consequence of the international pressure which preceded their granting, and the idea that the Security Council subsequently validated the agreement, see Fox (n 11) 177 – 200 and 217.

<sup>125</sup> See M Ruffert, 'The Administration of Kosovo and East Timor by the International Community', (2001) 50 *ICLQ* 555; for a critical discussion of the utility of consent as a source for the legitimacy of the exercise of public authority by international actors in Kosovo and East Timor, see Stahn (n 30) 521.

<sup>126</sup> See K. Daglish and H. Nasu, 'Towards A True Incarnation Of The Rule Of Law In War-Torn Territories: Centring Peacebuilding In The Will Of The People', (2007) *Netherlands International Law Review* 81-114.

<sup>127</sup> See Orakhelashvili (n 82); see also A. Carcano, 'End of the Occupation in 2004? The Status of the Multinational Force after the Transfer of Sovereignty to the Interim Iraqi Government', 11 *JCSL* (2006) 41 at 49 - 54; there is also a wider issue of whether the processes for identifying the governments have been consistent with the legal right to self-determination, see Wheatley (n 15) 536 and 549.

<sup>128</sup> This is evident from the calls in certain Security Council Resolutions for international support to be given at the request of the interim governments, see, e.g., SC Res. 1546 (2004) paras. 14 and 20 (rebuilding of economy and administrative capacity in Iraq).

presence.<sup>129</sup> Only in relation to the Solomon Islands was there no chapter VII authorisation for at least some of the involvement.<sup>130</sup> There are a number of possible reasons for seeking an additional legal justification in the form of a chapter VII authorisation. One possibility is that some states might find it easier in terms of domestic politics to provide military assistance when there is a chapter VII authorisation.<sup>131</sup> There is also the fact that consent is not a pre-requisite for the exercise of chapter VII powers, thus, if consent was to be withdrawn, those aspects authorised under chapter VII could remain in place.<sup>132</sup> Moreover, two legal justifications can also be seen as a pre-emptive step to deter any challenges to the legality of the international involvement, which, in turn, could undermine the legitimacy of the reconstruction process.<sup>133</sup> In this respect, it is also important to highlight the possibility of the endorsement of a government in a chapter VII resolution helping to persuade any undecided states that the purported government does enjoy governmental status.<sup>134</sup> It should be stressed that none of these reasons affect the view that consent is likely to be central to the securing of agreement at the Council on the chapter VII resolution, because of what consent symbolises in terms of the preservation of the right to self-determination and sovereignty.<sup>135</sup>

It is also important to note that, although consent in post-conflict situations has often been sourced from governments without independent effective control of the territory, there have been examples of situations where consent has come from a source with some degree of effective control. For instance, in relation to the Solomon Islands, Australia acted before the government had lost all control. More specifically, Australia provided military, technical and financial assistance to keep the government in authority and enable it to reconstruct the state.<sup>136</sup> Still, as it appeared inevitable that the government would lose what little control it had, the control was hardly reliable evidence in terms of identifying an embodiment of the will of the people. A central concern in the discussion below is whether it is appropriate for the legal right to self-determination to be so easily satisfied with regard to the initiation of international involvement that will at least enable, if not direct, post-conflict reconstruction.

### ***A. The Usefulness of the Present Approach to Legal Regulation of Local Ownership***

<sup>129</sup> See e.g., UN Doc. S/RES/1529 (2004) (on the situation in Haiti); these resolutions often call for but do not authorise wider international involvement, see e.g., SC Res. 1509 (2003) para. 15. (on the situation in Liberia).

<sup>130</sup> See R. Ponzio, 'The Solomon Islands: the UN and Intervention by Coalitions of the Willing' (2005) 12 *International Peacekeeping* 173

<sup>131</sup> See D Guilfoyle, 'Counter Piracy Law Enforcement and Human Rights', (2010) 59 *ICLQ* 141 – 169 at 147.

<sup>132</sup> See D Sarooshi, 'Conferral by States of Powers On International Organisations: the Case of Agency', (2003) 74 *BYIL* 291 -232 at 307 – 308.

<sup>133</sup> See J. Stromseth, D. Wippman, and R. Brooks (n 1) p. 52.

<sup>134</sup> See T Treves, 'Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia' (2009) 20 *EJIL* 399 at 407; the chapter VII aspect would also provide a legal basis for states that do not recognise the government to become involved in the military operation, see JG Dalton, JA Roach, and J Daley, 'Introductory Note to United Nations Security Council: Piracy and Armed Robbery at Sea—Resolutions 1816, 1846 and 1851' (2009) 48 *ILM* 129 a 130; also Guilfoyle (n 131) 147.

<sup>135</sup> In this respect, a consensual basis helps to substantiate the common affirmation in the Security Council Resolutions that have authorised military involvement that all states remain committed to 'to respect the sovereignty, political independence and territorial integrity' of the target state, see, e.g., SC Res. 1436 (2002) with regard to Sierra Leone.

<sup>136</sup> See Ponzio (n 130); E. Wainwright, 'Responding to State Failure – the Case of Australia and the Solomon Islands', (2003) 57 *Australian Journal of International Affairs* 485; D. McDougall, 'Intervention in the Solomon Islands' (2004) 93 *The Roundtable* 213.

In Afghanistan, the circumstances meant it was particularly challenging to find consent from a government with anything like a meaningful claim to be an embodiment of the will of the people. This was a result of the US-led coalition, which toppled the Taliban regime in October 2001, creating a governmental and security vacuum.<sup>137</sup> Ultimately, consent was provided by the Afghan Interim Authority. This government was created in December 2001, after having been selected by eminent Afghans<sup>138</sup> invited to an UN-backed conference in Bonn in November 2001.<sup>139</sup> It was – like every Afghan government since – dependent on an international military presence for any control over Afghan territory.<sup>140</sup> Yet, in the light of the widespread international support for the international engagement as a whole, following the events of September 11<sup>th</sup> 2001 in the USA, this lack of control was not a bar to it being seen as the government as a matter of international law. As such, in spite of little claim to be an embodiment of the will of the people, it was treated as competent to consent to the military presence and the mass of other international assistance which enabled it to gain some control and start with the reconstruction.<sup>141</sup> This obviously represented little real concern for the political principle of self-determination. One might also be concerned that the consensual basis was simply a means for the international actors to avoid responsibility for their actions.<sup>142</sup> However, the circumstances were such that there needed to be immediate commencement with the reconstruction of the state. The alternative was stagnation, which would hardly have helped to convince the people of the sense in removing the Taliban from governance.

If the law had been more demanding in terms of the level of coincidence required between the request for international involvement and the will of the people, then this would have created major complications in terms of how to proceed in Afghanistan. It would perhaps still have been possible, in the light of the rationale for the involvement as a whole (response to September 11<sup>th</sup> 2001), to secure a chapter VII basis for the involvement. Yet, a more stringent requirement in terms of sourcing the will of the people would have affected the extent to which it was possible to portray the international involvement as leaving only a light foot print, in the sense of reconstruction being led by a domestic government;<sup>143</sup> an approach

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<sup>137</sup> See, M. Sedra, 'Security Sector Reform in Afghanistan: The Slide Towards Expediency', (2006) 13 *International Peacekeeping* 94 at 94.

<sup>138</sup> See Human Rights Watch, *Afghanistan's Bonn Agreement One Year Later: A Catalog of Missed Opportunities*, 5 December 2002, available at <[www.hrw.org/backgrounder/asia/afghanistan/bonn1yr-bck.htm](http://www.hrw.org/backgrounder/asia/afghanistan/bonn1yr-bck.htm)>, participants included Afghan military commanders, ethnic group leaders, expatriate Afghans, and representatives of the exiled king.

<sup>139</sup> Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions (Bonn Agreement), UN Doc S/2001/1154, 5 December 2001, in particular: Section III Interim Administration A. Composition. 3; see also C. McCool, *The Role of Constitution Building Processes in Democratisation*, International IDEA (2004) at 8.

<sup>140</sup> For an overview of the transitional political processes see A. Sailkal, 'The UN and Democratisation in Afghanistan', in E. Newman and R. Rich (eds.), *The UN Role in Promoting Democracy: Between Ideals and Reality* (2004), 320 at 357.

<sup>141</sup> For critique of the extensive international assistance that has been provided see A. Suhrke, 'The Dangers of a Tight Embrace: Externally Assisted Statebuilding in Afghanistan', in Paris and Sisk (n 1) 227 – 251.

<sup>142</sup> See Chandler, D, *Empire in Denial: The Politics of State-building* (Pluto Press, London 2006) 40.

<sup>143</sup> This is not to suggest that the conduct of the international actors has always been consistent with light foot print postulate, see A. Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (CUP, Cambridge 2003) 128.

which particularly the US judged was appropriate for the context.<sup>144</sup> This is because, if the entity identified as the domestic government did not have the competence to invite, or ask to leave, the international assistance, it would be much more difficult for it to be distinguished from a group of local actors working on behalf of the international actors, and the perception of the internationals as imperialists would be strengthened.<sup>145</sup> As such, the condition of the underdeveloped law of self-determination can be seen to have contributed to the legitimacy and, as a consequence, the effectiveness of the involvement.<sup>146</sup>

A somewhat similar series of events also occurred in Iraq. In Iraq, though, there had already been a period of reconstruction under the law of occupation. This was hindered by significant levels of domestic resistance, which, in turn, affected the stability of the situation.<sup>147</sup> Such instability accompanied by the obvious need to make progress with the reconstruction can help to explain the move to identify and transfer authority to a domestic government.<sup>148</sup> The selection of the interim government that followed was heavily influenced by international preferences and dependent on international support for its authority and ability to lead the reconstruction.<sup>149</sup> Nonetheless, it received widespread international recognition as the government of Iraq;<sup>150</sup> with the Security Council taking care to highlight that this government had the authority to ask the international actors to leave, even insisting that the chapter VII mandate for international involvement would be terminated if so requested.<sup>151</sup> The consensual basis the interim government provided for the international actors was deemed sufficient by the International Committee of the Red Cross (ICRC) to bring a formal end of application of the law of occupation.<sup>152</sup> This formal reclassification of the nature of the

<sup>144</sup> See Stromseth, Wippman and Brooks (n1) 118.

<sup>145</sup> See, eg., G Knaus and F Martin, 'Travails of the European Raj', (2003) 14 *Journal of Democracy* 60-74.

<sup>146</sup> It should be stressed that, in terms of the overall effectiveness of the international involvement, it is not contended here that validity under international law is more important than the correlation of the consent with the will of the people. On the importance of consent as a general, rather than a legal, matter for the effectiveness of international engagement in post-conflict situations, see MW Doyle, I Johstone and RC Orr, 'Strategies for Peace: Conclusions and Lessons', in MW Doyle, I Johstone and RC Orr (eds) *Keeping the Peace: Multidimensional UN Operations in Cambodia and El Salvador* (CUP, New York, 1997) 369 at 386; see also J van der Lijn, 'If Only There Were a Blueprint! Factors for Success and Failure of UN Peace-Building Operations', (2009) 13 *Journal of International Peacekeeping* 45-71.

<sup>147</sup> See A Rathmell, Planning Post-Conflict Reconstruction in Iraq: What can we Learn? (2005) 85 *International Affairs* 1013 – 1038 at 1024.

<sup>148</sup> See UN News Story, 14 April 2004, 'UN confident Iraqi interim government will be formed ahead of power transfer – Brahimi', available at <<http://www.un.org/apps/news/story.asp?NewsID=10390&Cr=iraq&Cr1#>> accessed 26 July 2010: 'Mr. Brahimi added that he believed that the political framework he outlined for the setting up of the interim government, the organization of a national dialogue conference, combined with a number of confidence-building measures addressing real concerns of the Iraqis, "should, I hope, help this country to move forward towards recovery, peace and stability."'; Cf. S. Chesterman, 'Occupation as Liberation: International Humanitarian Law and Regime Change', (2004) 18 *Ethics and International Affairs* 61 – 74 at 73 – 74.

<sup>149</sup> See Carcano (n 127) 66; A. Roberts, 'The End of Occupation: Iraq 2004', 54 *ICLQ* (2005) 27 – 48 at pp. 47-48.

<sup>150</sup> See Carcano (n 127) 48 – 49.

<sup>151</sup> SC Res 1546 (para 12); see also A Roberts, 'The End of Occupation: Iraq 2004', (2005) 54 *ICLQ* 27 at 43-44; somewhat paradoxically the resolution endorses that the interim government will refrain from taking any actions affecting Iraq's destiny (para 1), a phrase which was interpreted by the CPA as precluding the interim government from making security agreements with other countries, see Carcano (n 127) 52; Roberts 44 and 46.

<sup>152</sup> ICRC, 'Iraq post 28 June 2004: Protecting Persons Deprived of Freedom Remains a Priority' 9 August 2004 <<http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/63KKJ8>> (accessed 21 July 2010).

international involvement did not extinguish all domestic resistance.<sup>153</sup> Nonetheless, it can still be seen as an important step in the progress of Iraq towards an independent and stable future. In particular, this is because from this point onwards the reconstruction process was no longer hindered by doubts about the legality of change and development under the law of occupation – a facet which can hardly have been conducive to the domestic or international acceptance of the practice.<sup>154</sup>

Another reason to appreciate the present condition of the law on self-determination is that it can be seen to have been conducive to the conclusion of peace agreements; agreements that have ushered in and provided a framework for the stability and progress of the post-conflict stage in some situations. It is common for at least some of the parties to a peace agreement to want the signing of the agreement to be followed by the initiation of considerable international involvement, which will help maintain order in the transitional period but also assist with the reconstruction. For instance, in relation to Cambodia, a relatively short period of international involvement, including direct governance was introduced in 1991 as part of the peacemaking process that sought to bring the main factions together and end the conflict that had plagued Cambodia, to varying degrees, throughout the 1970s and 1980s.<sup>155</sup> Another example is found in the recent past of Bosnia and Herzegovina. Here, the conflict was ended with the Dayton Agreement of November 1995,<sup>156</sup> which brought together the three main warring factions and set out the terms for peace, including provision for significant, eventually long-term, international involvement.<sup>157</sup> More recently, in Liberia in 2003, large-scale international involvement was invited as part of the Comprehensive Peace Agreement,<sup>158</sup> and has since proceeded to keep the transitional government that was selected by warring factions and, subsequently, the elected government in authority.<sup>159</sup> The circumstances in which these agreements were negotiated have many differences. Commonly, though, from the perspective of self-determination, there is reason to query the basis for treating the participants in the peace processes as an embodiment of the will of the people. In particular, none of the parties to any of the agreements had managed to sustain independent effective control of the territory in question.<sup>160</sup> As such, international recognition

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<sup>153</sup> Carcano (n 127) 42 – 43.

<sup>154</sup> For an example of the extensive international legal commentary on the legality of reconstruction under the law of occupation, see C McCarthy, 'The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq', (2005) 10(1) *JCSL* 43–74.

<sup>155</sup> 1991 Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, Part 1, Section 1, Article 1 and Article 6; also SR Ratner, 'The Cambodia Settlement Agreements', (1993) 87 *AJIL* 1.

<sup>156</sup> The General Framework Agreement for Peace in Bosnia and Herzegovina (GFAP), initialled at Dayton on 21 November 1995 and signed in Paris on 14 December 1995, (1996) 35 *ILM* 75; for an account of proceedings see C. Bildt, *Peace Journey* (1998), Chief EU negotiator in Bosnia from 1995.

<sup>157</sup> See D Chandler (ed) *Peace without Politics? Ten Years of State-Building in Bosnia* (Routledge, Oxford 2007); on the elements of coercion surrounding the agreement see Fox (n 11) p. 76.

<sup>158</sup> Peace Agreement between the Government of Liberia, the Liberians United for Reconciliation and Democracy, the Movement of Democracy in Liberia and the Political Parties (CP Agreement), UN Doc. S/2003/850, 18 August 2003, Part 9 Article XXIX para. 4.

<sup>159</sup> See Eleventh progress report of the Secretary-General on the United Nations Mission in Liberia (9 June 2006) S/2006/376; see also, on the nature of the Liberian Transitional Government, Stromseth, Wippman, and Brooks (n 1) 101; on the wider problems of local ownership that continue to effect the reconstruction process in Liberia, see M Boas and K Stig, 'Security Sector Reform in Liberia: An Uneven Partnership without Local Ownership', (2010) 4 *Journal of Intervention and Statebuilding* 285 – 303.

<sup>160</sup> This can help to explain why, in the Cambodian peace agreement, the subsequent elections were identified as the means by which the parties would ensure the 'exercise of the right to self-determination of the Cambodian

must be a prominent part of the explanation for why in each instance there was the legal capacity to provide a consensual basis for the international involvement. The important point is that in all three of these examples, if the law had been more demanding in terms of a demonstration of the will of the people for international involvement, there would have been a risk of at least complicating the initiation of international involvement. This might not have prevented a peace agreement in any of the examples, but it could certainly have hindered the peace process. For instance, any party that harbored doubts about the commencement of large-scale international engagement could have used the law to their advantage in the negotiating process.<sup>161</sup>

The issue of evidence of the will of the people appears to have hardly affected the peace processes in Liberia, Bosnia, or Cambodia. In this respect, though, events in Cambodia are still particularly noteworthy. In the Cambodia context, international recognition was essentially split between the two main factions: the People's Republic of Kampuchea (PRK) (supported by the Soviet Bloc) and the Coalition Government of Democratic Kampuchea (CGDK) (supported the US, China, and Association of Southeast Asian Nations (ASEAN)).<sup>162</sup> Consequently, there was not 'a single government accepted by all states as politically legitimate and legally able to delegate power'.<sup>163</sup> But there was – in the absence of legal criteria for determining which had the stronger claim to be the government – a basis for both sides to claim that they had the international legal authority to invite large-scale international to give them control of the state. If the international actors had accepted such an invitation, it would have led to a massive aggravation of both the situation and international order; a point reflected in the fact that the Security Council refused to authorise international involvement until there was agreement amongst the factions.<sup>164</sup> Instead, international efforts facilitated the bringing together of the two main factions to form a single entity, the Supreme National Council, which was created solely for the purpose of consenting to the international involvement;<sup>165</sup> involvement which then oversaw an electoral process to identify a single government. Subsequent events suggest that the situation could have benefited from a different approach to international engagement.<sup>166</sup> This does not detract from the view that the situation as it stood at the time was aided by delaying international involvement until agreement on the form it should take could be reached between the two factions.

The approach taken to sourcing an expression of the will of the people in Cambodia can be seen as a responsible exercise of the discretion that international actors are afforded under

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people' (n 155); this was repeated in SC Res. 745 (1992); on the concept of internal self-determination as an organising principle for ineffective states seeking reconstruction assistance from international actors, see Fox (n 61) 756.

<sup>161</sup> For further exploration of the relationship between peace processes and political and legal concepts of self-determination, see C Bell, *On the Law of Peace* (2008) (OUP, Oxford) particularly 218 – 238.

<sup>162</sup> See Ratner (n 155) 9 footnote 45; J. Song, 'The Political Dynamics of the Peacemaking Process in Cambodia' in Doyle, Johnstone, Orr (n146) 53 at 54.

<sup>163</sup> See Ratner (n 155) 9.

<sup>164</sup> See Ratner (n 155) 9.

<sup>165</sup> See Ratner (n 155) 9-10.

<sup>166</sup> See D Roberts, 'The Superficiality of Statebuilding in Cambodia: Patronage and Clientelism as Enduring Forms of Politics', in Paris and Sisk (n 1) 149 – 169; on the subsequent approach to international recognition of Cambodian governments, see Murphy (n 83) 147 – 148.

international law, in terms of identifying an embodiment of the will of the people. That is, while there was the possibility of an arguably valid source of consent for large-scale international involvement – which, if valid, would have reconciled the practice with the legal right to self-determination regardless of the actual connection between the source of consent and the will of the people – the international actors were right not to seek to encourage such a course of action. This is because one consequence would have been a likely destabilisation of the path the state was on towards an independent and effective future, which appeared dependent on bringing the two factions together. Another consequence, of the fact that the circumstances were clearly not suited to international engagement at this time, would have been a lack of wider international acceptance and support. This latter aspect is a reflection of the idea that although gains in terms of security and human rights, from an international intervention, are likely to make a clear departure from the political principle of self-determination more acceptable for the wider international society of states, the contrary is also true. The willingness of international actors to exercise their discretion responsibly appears, as is now turned to, central to the sustainability of the present approach to legal regulation of local ownership of the decision to initiate international involvement.

### ***B. The Sustainability of the Present Approach to Legal Regulation of Local Ownership***

In terms of large-scale international involvement proceeding on what can more readily be seen as a meaningful request from the people, two examples which stand out are those of Haiti in 1994 and Sierra Leone in 1998. Firstly, in 1994, large-scale involvement restored the exiled government of Aristide to authority in Haiti. Then, in 1998, there was eventually enough international support to enable the exiled government of Kabbah to be restored to authority in Sierra Leone. Both of these governments, before being removed from office by rebel uprisings, had been elected in internationally monitored elections. Thus in spite of a lack of control of the territory, they had a strong claim to be an embodiment of the will of the people. This underpinned the widespread continuation of international recognition, and helps to explain the motivation for extensive international involvement in their favour, in spite of the emergence of other governments in both situations with competing claims to governmental status.<sup>167</sup> Following the international intervention in Haiti, the stability of the situation was affected by the policy decisions of the government, particularly an unwillingness to co-operate with the international actors.<sup>168</sup> In Sierra Leone, the government, and the period of reconstruction it directed, eventually ushered in a period of stability which since 2005 has been sustained without an international military presence.<sup>169</sup>

The success of the reconstruction effort in Sierra Leone – relative to the difficulties that have been encountered in other situations where international involvement has proceeded on the basis of a request from an agent with a weaker claim to be an embodiment of the will of the

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<sup>167</sup> See Roth (n 17) at 377 and 407.

<sup>168</sup> D Malone and S von Einsiedel, “Haiti”, in M. Berdal and S. Economides (eds.), *United Nations Interventionism 1991–2004* (2007) pp. 178–179.

<sup>169</sup> For an overview of the progress made and the challenges which remain in Sierra Leone see Report of the Peacebuilding Commission, A/61/901–S/2007/269, 14 May 2007.

people –<sup>170</sup> might be seen as a reason to craft new criteria for governmental status in post-conflict situations based on democratic credentials. However, one needs only to think about how these criteria would have operated in Afghanistan, Iraq, Cambodia, Liberia, and Bosnia Herzegovina – potentially hindering the initiation of international involvement and with it the stability of the situation – to understand why at no point, in debates at the UN at least,<sup>171</sup> was there any effort from the lead actors concerned with Sierra Leone to suggest that the governmental status as a matter of international law was directly based on democratic credentials. One consequence of this decision to not seek to develop the law of self-determination is that the potential for a misuse of the discretion that international law affords lead actors to determine the will of the people has not been reduced. Indeed, one of the most striking examples which might be queried as an irresponsible exercise of the discretion was in Haiti in 2004.

In Haiti in 2004, amidst considerable unrest, instead of backing the elected government, the same international actors encouraged President Aristide, the same President who had previously been supported in 1994, to step down. This led to an internationally facilitated selection process for a new government. This process involved discussions between a three-member council, which consisted of a representative of Aristide's party, one from the main opposition party, and one international representative. Together they selected seven eminent persons to identify a Prime Minister, Gérard Latortue, who then selected his government.<sup>172</sup> This government would not have enjoyed anything like control of the state without the massive international military presence that it invited.<sup>173</sup> And without sustained financial and technical assistance,<sup>174</sup> the government would not have been able to pursue any of the reconstruction projects that it agreed to in the 2004 Interim Co-operation Framework for Haiti.<sup>175</sup> The inconsistency of this approach with the political principle of self-determination can help to explain the reluctance of CARICOM to recognise the new government.<sup>176</sup> However, because there was still considerable international recognition, this did not affect the

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<sup>170</sup> Still, in all situations where there has extensive international involvement in post-conflict reconstruction over the last twenty years, including Sierra Leone, 'challenges of legitimacy, governance, security, economic development and general viability' remain prominent, Bowden, Charlesworth and Farrall, 'Introduction' in Bowden, Charlesworth and Farrall (n 1) p 2; on the challenges that Sierra Leone continues to face see I Taylor, *Earth Calling the Liberals: Locating the Political Culture of Sierra Leone as the Terrain for "Reform"*, in E Newman, R Paris, and OP Richmond (eds), *New Perspectives on Liberal Peacebuilding* (2009) (UN University Press, Tokyo) 159-177; also CP Kurz, 'What You See is What You Get: Analytical Lenses and the Limitations of Post-Conflict Statebuilding in Sierra Leone', (2010) 4 *Journal of Intervention and Statebuilding* 205 - 236.

<sup>171</sup> See, eg., GA Debates, 19th plenary meeting Wednesday, 1 October 1997, 10 a.m. New York, October 1<sup>st</sup> A/52/PV.19; p. 8 and p. 11; SC Debates, 3902nd Meeting Monday, 13 July 1998, 12.20 p.m. New York, S/PV.3902, Agenda: Situation in Sierra Leone, Fifth report of the Secretary-General on the Situation in Sierra Leone (S/1998/486 and Add.1).

<sup>172</sup> See 2004 Interim Cooperation Framework for Haiti, available at <<http://haiticci.undg.org/>>.

<sup>173</sup> See, e.g., SC. Res. 1529 (2004).

<sup>174</sup> See, e.g., SC. Res. 1542 (2004), para. 13 'Emphasizes the need for Member States, United Nations organs, bodies and agencies and other international organizations, in particular OAS and CARICOM, other regional and subregional organizations, international financial institutions and non-governmental organizations to continue to contribute to the promotion of the social and economic development of Haiti, in particular for the long-term, in order to achieve and sustain stability and combat poverty'

<sup>175</sup> A framework which emanated from a process led by representatives of the Inter-American Development Bank, the European Commission, the World Bank, and the United Nations System, and mapped out how Haiti would be changed and developed over the next two years throughout all sectors, see (n 172).

<sup>176</sup> Malone and von Einsiedel (n 168) p. 185.



validity of the consent or the consequent satisfaction of the legal right to self-determination. One can, though, understand why external onlookers might be concerned. This was the government that the people had elected and international actors were making the determination that it was no longer fit to govern. Still, the circumstances support the view that this was a responsible exercise of the discretion that international law affords international actors. More specifically, it was apparent that the policies of the elected government were now a major cause of the unrest. Accordingly, to have assisted this government would have been majorly counter-productive for the stability of the situation. This example does, though, serve to illustrate the difficulties that can be involved in making the assessment of when the context is such that it justifies a departure from the principle of self-determination. In this respect, events in Somalia in 2006/2007 represent what can be seen as a far less persuasive exercise of the discretion.

Towards the end of 2006, Somalia had two entities both claiming to be the government of Somalia. Nonetheless, there was reported to be more peace and order than Somalia had known for 15 years.<sup>177</sup> One entity was the Transitional Federal Government, the existence of which can be traced back to the 2004 Intergovernmental Authority on Development (IGAD)-led Somalia National Reconciliation Conference, which brought prominent Somalian's together in Nairobi. Established in exile, this government was not democratically elected, nor had it been able to gain meaningful independent control over the territory. As such, it hardly represented an embodiment of the will of the people. Nonetheless, it considered itself and received international recognition as the sole government of Somalia;<sup>178</sup> a key factor in this respect must be its commitment to eventually hold elections.<sup>179</sup>

In 2006, the Transitional Federal Government had its seat in Baidoa, having lost the capital, Mogadishu, and 8 of the country's 18 administrative regions to the other entity competing to be seen as the government, the Union of Islamic Courts. The latter being an alliance between militant Islamist groups, clan courts which applied Islamic law, and businessmen. This alliance was formed in 2004 as a means to better protect its members from warlords.<sup>180</sup> The Union of Islamic Courts is reported to have believed it had considerable support amongst the people of Somalia, but patrols by its hardcore militiamen men are a reason to query how much this support was genuine rather than coerced.<sup>181</sup> This latter aspect, and suspicions of harbouring Al Qaeda, must help to explain why its commitment to, eventual, democratic rule did not engender more international support.<sup>182</sup> In sum, both entities enjoyed some degree of

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<sup>177</sup> J. Gettleman, 'Islamists calm Somali Capital with Restraint', September 24, 2006, P. A1, New York Edition, International Herald Tribune available at <[http://www.nytimes.com/2006/09/24/world/africa/24somalia.html?\\_r=1](http://www.nytimes.com/2006/09/24/world/africa/24somalia.html?_r=1)>; on the history of the situation in Somalia see G Kreijen, *State Failure, Sovereignty and Effectiveness* (Martinus Nijhoff, The Hague 2004) 67-68; G. Fox, 'Democratization', in D. M. Malone (ed.), *The U.N. Security Council: From the Cold War to the 21st Century* (Lynne Rienner, Boulder 2004) 69 at 75

<sup>178</sup> See 2004 Transitional Federal Charter of the Somalia Republic, Article 1.1.; J. Gettleman, (n 177)

<sup>179</sup> See e.g., answer of the UK Secretary of State for Foreign and Commonwealth Affairs, Hansard Written Answers, 16 Jan 2007, Col. 986w

<sup>180</sup> J. Gettleman, (n 177)

<sup>181</sup> See J. Gettleman, (n 177)

<sup>182</sup> See J. Gettleman, (n 177)

control of the territory, but both lacked any other real evidence that they should be treated as an embodiment the will of the people.

Nonetheless, international recognition strongly favoured one government over the other. Accordingly, in the light of what was set out above regarding international law on governmental status, the Transitional Federal Government arguably had the legal capacity to invite the type of large-scale international involvement that would put it in control of the state. Given the context, however, it could hardly be deemed in the best interests of the stability of the situation for such a course of action. Instead, the responsible approach would be, as had generally been the case up until October 2006, for international actors to prioritise the political principle of self-determination, delay extensive intervention, and work to facilitate negotiation between the two sides in order to produce a government with a stronger claim to be an embodiment of the will of the people.

In October 2006, there were clashes between militia of the Islamic Courts and forces allied to the Federal Transitional Government only 60km from the Transitional Government in Baidoa.<sup>183</sup> This helps to explain the request of the African Union (AU) and the Intergovernmental Authority on Development (IGAD) for the Security Council to adopt a chapter VII resolution to authorise the deployment of an AU/IGAD force to protect the Transitional Federal Government. The Council issued SC Res. 1725 on 6<sup>th</sup> December 2006. This authorised, under chapter VII, the IGAD and Member States of the African Union to establish a protection and training mission in Somalia. The main thrust of the mandate was to provide protection for the Transitional Government. More specifically, the aim was to secure the continued existence of the Transitional Government rather than increase its control.<sup>184</sup> Amongst other things, the resolution also emphasized the need, in the interests of stability of the situation, for continued dialogue between the Transitional Government and the Union of Islamic Courts. Although the Transitional Federal Government welcomed the resolution, the Union rejected it, seeing it as ‘tantamount to an invasion of Somalia by Ethiopia.’<sup>185</sup> This was in spite of the fact that the resolution endorsed ‘the specification in the IGAD Deployment Plan that those States that border Somalia would not deploy troops to Somalia’<sup>186</sup> (which would include Ethiopia). Following the issuance of the resolution without the consent of the Union, the Union’s militia advanced closer to Baidoa.<sup>187</sup> Then, contrary to what the SC had endorsed, at the end of December 2006, Ethiopia’s military became heavily involved on the side of the Transitional Federal Government. Fighting alongside the Government’s forces, the Ethiopian’s enabled the removal of the Union from authority in Mogadishu and installed the Transitional Federal Government.<sup>188</sup>

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<sup>183</sup> Secretary General’s Report (n 9) para. 2.

<sup>184</sup> SC Res 1725 para. 3: ‘(a) To monitor progress by the Transitional Federal Institutions and the Union of Islamic Courts in implementing agreements reached in their dialogue; (b) To ensure free movement and safe passage of all those involved with the dialogue process; (c) To maintain and monitor security in Baidoa; (d) To protect members of the Transitional Federal Institutions and Government as well as their key infrastructure; (e) To train the Transitional Federal Institutions’ security forces to enable them to provide their own security and to help facilitate the re-establishment of national security forces of Somalia.’

<sup>185</sup> Secretary General’s Report (n 9) para. 4

<sup>186</sup> Operative para. 4 SC Res 1725

<sup>187</sup> Secretary General’s Report (n 9) para. 4

<sup>188</sup> Secretary General’s Report (n 9) para. 5

Subsequently, the Transitional Federal Government has remained dependent on an internationally military presence. This was first from Ethiopian forces, and then from African Union Members (other than Ethiopia). The latter were also invited by the government but, in contrast to the Ethiopians, the legal basis for their operations has been buttressed by a series of chapter VII resolutions.<sup>189</sup> More recently, the government has been made more inclusive and the situation in Somalia has shown signs of starting to stabilise again.<sup>190</sup> Nonetheless, these advances can hardly be attributed to the efforts of Ethiopia, especially as their removal from the state has been central to the willingness of certain groups to co-operate with the government.<sup>191</sup>

It might be possible to argue that Ethiopia was prohibited from becoming involved on the basis of consent from the transitional government, as a result of the Security Council endorsement of the IGAD plan, which excluded Ethiopia. Leaving this possibility to one side, the example highlights the accountability gap that exists in the present legal framework with regard to the identification of an embodiment of the will of the people for the initiation of international participation in post-conflict reconstruction. That is, in spite of the fact that there was little to connect it to the will of the people or that the context would benefit, Ethiopia was arguably free to become involved in support of the government because this government enjoyed extensive international recognition.<sup>192</sup> Such a course of action would have a claim to be consistent with the legal right to self-determination, but would clearly run contrary to the underlying political principle.

This accountability gap has implications for the stability of post-conflict situations, the self-determination of peoples, and international order. However, to close this gap would require specification of criteria as to when a government is sufficiently attached to the will of the people to be able to make a request on their behalf for internationally facilitated reconstruction of the state and civil infrastructure. Such criteria would help to protect the notion of self-determination at stake, and one might argue that the Security Council could authorise action wherever there was a difficulty in sourcing consent. However, along with the problem of selectivity at the Security Council, there is the fact that valid consent itself is often central to a willingness to authorise international involvement. And then there are the benefits, highlighted above, that the fact of valid consent in and of itself can bring to the stability of a situation. Ultimately, then, from the perspective of the stability of post-conflict situations it would seem preferable not to have such criteria.

Moreover, the fact that Somalia is the one example where this accountability gap has really been noticeable – because elsewhere there has tended to be a strong contextual justification for accepting consent from a government with little claim to be an embodiment of the will of the people – suggests that in reality the need for new law is not that pressing from the

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<sup>189</sup> See SC Res 1744 (2007) 20 February 2007

<sup>190</sup> J. Gettleman, 'Somali Backlash May Be Militants' Worst Foe', March 23<sup>rd</sup> 2010 P. A1, New York Edition, International Herald Tribune available at < <http://www.nytimes.com/2010/03/24/world/africa/24somalia.html> >

<sup>191</sup> Gettleman (n 190)

<sup>192</sup> A point which is sustained regardless of the claims made by Ethiopia that it was acting in collective self-defence with the Federal Transitional Government on the basis of what it claimed was international support for the Union's advance. See Secretary General's Report (n 9) para. 5.

perspective of self-determination and international order. However, it is apparent that many more examples along the lines of Ethiopia's engagement in Somalia, and calls will be made from an international society, which is caught between solidarist and pluralist elements, for a strengthening of the law. Accordingly, to encourage the sustainability of the existing, underdeveloped, legal framework, and preserve the attendant benefits for the stability of post-conflict situations, it would seem imperative that international actors continue to exercise their discretion responsibly. This means refusing to initiate involvement on the basis of a request from a government with little claim to be an embodiment of the will of the people, unless there is strong contextual justification for such a course of action.

## **5. Conclusion**

This article has highlighted that the law which presently regulates local ownership of the initiation of international involvement in the aftermath of war was not crafted with this setting in mind. It has also set out that, in the light of the present condition of international society, compliance with the law of self-determination remains central to international order. Still, the law of self-determination has been shown to have hardly hindered the practice of large-scale international involvement in post-conflict reconstruction over the last twenty years. This is in the sense that even in those situations where nothing like an accurate expression of the will of the people has been possible, provided there has been consent from a government with some degree of international recognition, the law of self-determination has been satisfied. Consequently, the law has not been an incentive for a pro-active approach towards local ownership, but it has also not hindered the international involvement where it has been deemed necessary. This is a reflection of the underdeveloped nature of the law of self-determination, in terms of criteria for identifying an agent for the rights of a people.

In most of the examples considered in this article, where consent has come from a government with only a minimal claim to popular legitimacy, such an approach to local ownership has been justified on the essential, and readily apparent, need for international engagement to help with the transition from conflict to long-term peace. Consequently, although the political principle of self-determination at stake has to some extent been compromised, this has enabled gains in terms of security and human rights. These gains will have helped to engender wider international support and acceptance amongst an international society, which remains committed to the principle of self-determination but is increasingly moving away from its pluralist roots to a more solidarist foundation.

Events in Somalia demonstrate that the underdeveloped nature of the law of self-determination not only leaves open the possibility of international actors becoming involved in a situation without meaningful expression of the will of the people, but also becoming involved where there is not a strong contextual justification. When there are no clear gains for the stability of a situation, then the contravention of the political principle of self-determination is far more likely to be met with concern, than support, from the wider international society of states. Presently, the Somalia example stands alone, in terms of an

example of an irresponsible exercise of the discretion that international actors are afforded to determine when a request for their involvement is a sufficient reflection of the will of the people. However, if there is more practice of states becoming involved on the basis of consent from an ineffective but internationally recognised government before the context is ready, then there can be expected to be calls for a strengthening of the legal framework through criteria for when a government is competent to consent. Such law would help to enhance consistency with the political principle of self-determination, but would not be desirable from the point of view of the stability of the situation. In particular, it could serve to hinder the initiation of international involvement in instances where the criteria could not be met.

Accordingly, this article suggests that it would be preferable for the accountability gap to remain. However, it also recognises that, if this is to be feasible, international actors must adopt a responsible approach to local ownership of the decision to initiate international involvement in post-conflict situations. This entails international actors refusing to initiate involvement on the basis of a request from a government with little claim to be an embodiment of the will of the people, unless there is strong contextual justification for such a course of action.

However, it is also apparent that the distinction between a context which justifies commencement of international engagement in a manner that is, essentially, ignorant of the will of the people, and one where the principle of self-determination should be prioritised and the international presence delayed, is not always going to be easy to make. Thus this article should also be seen as call for more research into the type of circumstances that would justify, for instance, the type of intervention witnessed in Haiti, where an elected government was replaced by a part internationally selected, non-elected, government.

Finally, this article has demonstrated how consent from a government in a post-conflict situation is not the same as in a functioning state, in terms of reconciling international involvement in the affairs of a state with the political principle of self-determination or enhancing the stability of the situation. On this basis, this article should be seen as reason for more attention to be given, in the policy work on best practice for local ownership, to the initiation of international involvement in post-conflict situations. One suggestion would be to investigate possible means by which international actors could look beyond the government and engage with civil society and affected communities in the decision to commence involvement.<sup>193</sup> By looking away from the law for a method to improve consistency with the political principle of self-determination, such research would help to reduce the need for new law, which would be unlikely to be as useful to the stability of post-conflict situations as the present approach to this aspect of legal regulation of local ownership has been.

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<sup>193</sup> See Pouligny (n 2) at 177.